Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4428

Appeal PA18-267

Ministry of the Solicitor General

August 18, 2023

Summary: The appellant is the father of Soleiman Faqiri, an inmate who died after an altercation with correctional officers at Central East Correctional Centre on December 15, 2016. The Ministry of the Solicitor General (the ministry) disclosed some records and parts of records to the appellant in response to his access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) but denied access to others under the exclusion in section 65(6) (employment and labour relations records), various discretionary exemptions in section 14(1) (law enforcement), and the mandatory exemption in section 21(1) (personal privacy).

In this order, the adjudicator finds that a substantial number of records and parts of records, which shed considerable light on the incident that led to the inmate's death, are not excluded from the *Act* under section 65(6) or exempt from disclosure under sections 14(1) or 21(1). These records include most of the use of force occurrence reports filed by correctional staff that describe the force that was used against the inmate and a video of a segregation unit hallway taken on the day the inmate died. The adjudicator orders the ministry to disclose these records and parts of records to the appellant, with some severances for information that is exempt from disclosure.

The adjudicator upholds the ministry's decision to withhold some records because they are excluded from the *Act* under section 65(6) and parts of other records because they are exempt from disclosure under sections 14(1)(k) or 21(1). However, he finds that the public interest override in section 23 of the *Act* applies to some of the information found exempt under section 21(1) and orders that it be disclosed to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 2(1) (definition of "personal information"), 2(3), 14(1)(b), (e), (i), (j), (k) and (l), 21(1), 21(2), 21(3)(b), (d) and (g), 21(4)(d), 23, and 65(6)1 and 3; R.R.O. 1990, O. Reg. 778 (*Ministry of Correctional Services Act*), s. 7.

Orders: Orders PO-2332, PO-2494, PO-3905, PO-4269-I, M-927 and MO-4119.

Cases Considered: *Ontario (Ministry of Community and Social Services) v. Doe*, 2014 ONSC 239 (CanLII), appeal dismissed *Ontario (Ministry of Community and Social Services) v. John Doe* 2015 ONCA 107 (CanLII); *Ontario (Attorney General) v. Information and Privacy Commissioner*, 2009 CanLII 9740 (ON SCDC); *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC); *Duncanson v. Fineberg* 1999 CanLII 18726 (ON SCDC); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

OVERVIEW:

Background

[1] On December 15, 2016, Soleiman Faqiri (the inmate or the deceased inmate) died after an altercation with correctional officers in a segregation cell at Central East Correctional Centre in Lindsay. His death was covered widely in the media and triggered a criminal investigation by the Kawartha Lakes Police Service (KLPS). The Office of the Chief Coroner (the coroner) also initiated an investigation under the *Coroner's Act* to determine the medical cause of his death.

[2] The KLPS later announced that there were no grounds for bringing criminal charges against the correctional officers involved in the altercation with the inmate. In addition, the coroner issued a report that concluded that the medical cause of the inmate's death was "unascertained."[1]

Access request

[3] The Ministry of the Solicitor General (the ministry)[2] manages provincial correctional institutions in Ontario, including Central East Correctional Centre, and employs most of their staff, such as correctional officers. The deceased inmate's father (the appellant) submitted an access request on behalf of the family to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "all records and personal information" about his son held by the ministry. He further specified that these records should include all videos which depict his son both on

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[1] www.cbc.ca/news/canada/toronto/soleiman-faqiri-criminal-charges-inmate-death-1.4377327
[2] Formerly the Ministry of Community Safety and Correctional Services.

December 15, 2016 or on any other date.[3]

[4] In response to his access request, the ministry located a number of responsive records, including various health care records, a staff memo, an Automated External Defibrillator (AED) event form, employee/other information reports, occurrence reports, inmate incident reports, use of force occurrence reports, emails, correctional officer notes and surveillance videos.

[5] The ministry then issued an access decision to the appellant in which it claimed that all of the records are excluded from the *Act* under section 65(6). This provision excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, a record is not subject to the access scheme in the *Act*.[4]

Appeal

[6] The appellant appealed the ministry's access decision to the Information and Privacy Commissioner of Ontario (IPC), and a mediator was assigned to assist the parties in resolving the issues in dispute.

[7] During mediation, the ministry issued a supplementary access decision to the appellant which stated that its internal investigation into his son's death had concluded and that it had decided to grant him partial access to the requested records. It also stated that it had considered the compassionate reasons provision in section 21(4)(d) of the *Act* in making its supplementary decision.[5]

[8] The ministry disclosed a number of records, some in full and others in part, to the appellant, including health care records, a staff memo, an AED event form, employee/other information reports, occurrence reports, inmate incident reports, and some use of force occurrence reports and use of force local investigation reports. The names and other information relating to many of the correctional staff who were on duty on the day the inmate died, including correctional officers, managers and health care staff, appear in these records and were disclosed to the appellant.

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[3] He had also submitted an earlier access request to the KLPS under the *Municipal Freedom of Information and Protection of Privacy Act* for records relating to his son's death. The KLPS decided to disclose some records to him but denied access to others, and he appealed its access decision to the IPC, which opened appeal MA17-716. I am also the adjudicator in that appeal and will be issuing an order after this one that addresses whether the records withheld by the KLPS should be disclosed to the appellant.

[4] Order PO-2639.

[5] The head of an institution must consider section 21(4) in assessing whether the mandatory personal privacy exemption in section 21(1) of the *Act* applies to personal information. Section 21(4)(d) states that despite section 21(3), a disclosure does not constitute an unjustified invasion of personal privacy if it discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the head of an institution is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[9] However, the ministry withheld some records, including a large number of use of force occurrence reports and several surveillance videos, under the section 65(6) exclusion. It withheld information in other records under a number of exemptions in the *Act*, including:

- section 49(a) (discretion to refuse access to requester's own personal information), read with section 13(1) (advice and recommendations), sections 14(1)(i), 14(1)(j), 14(1)(k) and 14(2)(d) (law enforcement), and section 18(1)(d) (economic and other interests);
- section 49(b) (personal privacy); and
- section 49(e) (right of access to one's own personal information/correctional records).

[10] The appellant cited the public interest override in section 23 of the *Act*, claiming that there is a compelling public interest in disclosing the withheld records and parts of records that clearly outweighs the purposes of the exemptions claimed by the ministry.

Adjudication

[11] This appeal was not resolved during mediation and was moved to adjudication where an adjudicator may conduct an inquiry to review an institution's access decision. The adjudicator initially assigned to this appeal decided to conduct an inquiry and sought and received representations on the issues to be resolved from the ministry and the appellant.

[12] In its representations, the ministry stated that it is no longer relying on some exemptions, including sections 14(2)(d), 18(1)(d) and 49(e). It did not provide representations on sections 49(a) and (b), because those provisions only apply in cases in which the requester is seeking access to their own personal information. In this case, the appellant is the father of the deceased inmate and he is seeking records containing the personal information of his son. The ministry provided representations on the section 65(6) exclusion, whether the records contain "personal information," as defined in section 2(1), the personal privacy exemption in section 21(1), and the law enforcement exemptions in sections 14(1)(b), (i), (j), (k) and (l).

[13] As this appeal moved through adjudication, there were a number of external developments. The family of the deceased inmate filed a $14.3 million civil suit against the ministry, the superintendent of Central East Correctional Centre, and seven correctional staff.[6] In addition, the Ontario Provincial Police (OPP) re-opened the criminal investigation into the inmate's death that had been previously conducted by the

[6] www.cbc.ca/news/canada/toronto/soleiman-faqiri-lawsuit-sues-eye-witness-1.4997830

KLPS.[7]

[14] At the appellant's request, this appeal was put on hold while the OPP investigation took place. The OPP later announced that no criminal charges would be laid against any correctional staff.[8] This appeal was taken off hold.

[15] This appeal was then transferred to me to continue the inquiry. I decided to invite the ministry to issue a supplementary decision letter to the appellant and supplementary representations to me setting out any exemptions it would claim in the event I were to find that a record is not excluded from the *Act* under section 65(6).

[16] In response, the ministry issued a supplementary access decision to the appellant for those records that it claims are excluded from the *Act* under section 65(6) and claimed the same exemptions that it cited in its original decision letter. It then provided me with supplementary representations that narrowed the list of claimed exemptions to the personal privacy exemption in section 21(1) and the law enforcement exemptions in sections 14(1)(b), (e), (i) and (k) of the *Act*.

[17] In its supplementary representations, the ministry referred to another external development: the Ontario Chief Pathologist had released a new report about the cause of the inmate's death. This report cited the following reasons: "Prone position restraint and musculocutaneous injuries sustained during struggle, exertion and pepper spray exposure in the setting of cardiomegaly and worsening symptoms of schizophrenia."[9]

[18] As a result of this report, the OPP revisited its criminal investigation into the inmate's death. However, it later advised the family that although it had reviewed and considered the Ontario Chief Pathologist's report, there were insufficient grounds to lay criminal charges against any correctional staff.[10]

[19] I continued my inquiry under the *Act* and decided that procedural fairness requires that those correctional staff whose information appears in the records and parts of records withheld by the ministry be notified of this appeal and given an opportunity to submit representations to me. I asked the ministry to provide me with updated contact information for these affected parties, and the ministry initially agreed to do so.[11] However, it later changed its position and refused.[12]

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[7] www.thepeterboroughexaminer.com/news/peterborough-region/opp-reopen-investigation-into-soleiman-faqiris-death-at-the-lindsay-superjail/article_b485c89b-42d1-593b-bb8e-5037423c4e4e.html?

[8] https://www.cbc.ca/news/canada/toronto/soleiman-faqiri-ontario-jail-charges-1.5674400

[9] www.newswire.ca/news-releases/ontario-s-chief-forensic-pathologist-ascertains-cause-of-death-in-case-of-soleiman-faqiri-814789312.html

[10] www.cbc.ca/news/canada/toronto/soleiman-faqiri-no-charges-1.6558485

[11] I also asked the ministry to provide me with updated contact information for a number of inmates because the records withheld by the KLPS in appeal MA17-716 include witness statements that these inmates provided to the KLPS about the altercation with correctional officers that led to the other inmate's death.

[20] As a result, I issued Interim Order PO-4269-I, in which I ordered the ministry to provide me with updated contact information for the affected parties in both this appeal and appeal MA17-716. The ministry complied with this interim order and provided me with updated contact information for these individuals.

[21] I then sent Notices of Inquiry to more than 90 correctional staff whose information appears in the records and parts of records withheld by the ministry.[13] I invited them to submit representations to me on a number of issues, including the section 65(6) exclusion, whether the records contain their "personal information," as defined in section 2(1), the personal privacy exemption in section 21(1), the law enforcement exemption in section 14(1)(e), and the public interest override in section 23 of the *Act*.

[22] In response, I received representations from a lawyer representing 17 correctional staff, including correctional officers and nurses. The same lawyer also submitted separate representations on behalf of two additional correctional officers. I will also be considering representations that two correctional managers and a correctional staff person each submitted in appeal MA17-716. I have reviewed and taken all of these representations into account in reaching my decision.

[23] In this order, I find that a substantial number of records and parts of records, which shed considerable light on the incident that led to the inmate's death, are not excluded from the *Act* under section 65(6) or exempt from disclosure under sections 14(1) or 21(1). These records include most of the use of force occurrence reports filed by correctional staff that document the force that was used against the inmate and a video of a segregation unit hallway taken on the day the inmate died. I therefore order the ministry to disclose these records and parts of records to the appellant with some severances for information that is exempt from disclosure.

[24] I uphold the ministry's decision to withhold some records because they are excluded from the *Act* under section 65(6) and parts of other records because they are exempt from disclosure under sections 14(1)(k) or 21(1). However, I find that under section 23 of the *Act*, there is a compelling public interest in disclosing the personal information of some correctional staff in the records that clearly outweighs the purpose of the section 21(1) exemption.

RECORDS:

[25] The records remaining at issue in this appeal are those that the ministry has withheld in full or in part. These records are set out in a chart, which is attached as Appendix A to this order. I have identified the exclusion and exemptions claimed by the ministry based on its representations and supplementary representations in this appeal,

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[12] The ministry's reasons for changing its position are cited in paragraph 17 of Interim Order PO-4269-I.
[13] Some of these correctional staff were notified directly and others through their legal counsel.

in which it narrowed the number of exemptions that it originally claimed in its decision letters to the appellant.

ISSUES:

A. Does the section 65(6) exclusion for records relating to labour relations or employment matters apply to the records?

B. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

C. Does the mandatory personal privacy exemption at section 21(1) apply to the withheld personal information in the records?

D. Do the discretionary law enforcement exemptions at sections 14(1)(b), (e), (i), (j), (k) and/or (l) apply to the withheld information in the records?

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

DISCUSSION:

A. Does the section 65(6) exclusion for records relating to labour relations or employment matters apply to the records?

[26] Section 65(6) excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, a record is not subject to the access scheme in the *Act*.[14] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.[15]

[27] The ministry claims that numerous records are not subject to the access scheme in the *Act* because they are excluded by section 65(6). These include many use of force occurrence reports filed by correctional officers that describe the force that was used against the inmate and the surveillance videos taken inside the correctional centre on the day the inmate died. Of all the records located by the ministry in response to the appellant's access request, these particular ones shed the most light on the incident that led to the inmate's death on December 15, 2016.

[28] The ministry submits that these records are excluded from the *Act* by section 65(6) "because they were and are being predominantly used for the purpose of employee discipline, including pending anticipated proceedings, as well as for other

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[14] *Supra* note 4.
[15] *Ontario (Ministry of Community and Social Services) v. Doe*, 2014 ONSC 239 (CanLII) (*John Doe*).

labour and employment related purposes arising directly as a result of the death of the inmate."

[29] It claims that both sections 65(6)1 and 65(6)3 apply to the records. These provisions state:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
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> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> . . .
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[30] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.[16]

[31] The type of records excluded from the *Act* by section 65(6) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.[17]

[32] The ministry claims that the exclusion in section 65(6)1 applies to the following records: the emails on pages 141 and 142, the employee/other information reports on pages 181-183 and pages 321-323, parts or all of a series of use of force occurrence reports between pages 190 and 251, and the surveillance videos.

[33] The ministry further submits that all of the same records that it claims are excluded under section 65(6)1 are also excluded under section 65(6)3. However, it claims that the following additional records are also excluded under section 65(6)3: an employee/other information report on pages 91, 96-97, 103 and 321-323, on line communications on pages 92-95, and 98-100, occurrence reports on pages 101-102 and 108-117, a health insurance record on page 105, a Health and Productivity Program Accommodation Plan on pages 106-107, email correspondence on pages 123-125, 129-130, 132-133, 135-136, 138-139 and 141-142, and parts of a use of force local investigation report on pages 313 and 316-317.

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[16] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

[17] *Ontario (Ministry of Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON SCDC) (*Goodis*).

Analysis and findings

[34] For the reasons that follow, I find that the above records are excluded from the *Act* by section 65(6), except for an employee/other information report about a police investigation (pp. 96-97), a series of emails from a manager to individual correctional officers (pp. 123-125, 129-130, 132-133, 135-136, 138-139, 141-142, 313 and 316-317), the use of force occurrence reports (pp. 149-251 and 190-251), and the surveillance videos.

[35] The parties provided extensive representations on whether the section 65(6) exclusion applies to the records. The ministry and the correctional staff submit that the records are excluded from the *Act* by sections 65(6)1 and 3, whereas the appellant submits that the exclusion does not apply to the records.

Interpretation of section 65(6)

[36] Many of the records that the ministry claims are excluded from the *Act* by section 65(6), including the use of force occurrence reports and at least one of the surveillance videos, shed considerable light on the incident that led to the inmate's death.

[37] Previous court decisions have stated that section 65(6) must be read in context and in light of its legislative history and the purposes of the *Act*, and should not be interpreted in a manner that has the effect of shielding government officials from public accountability.[18] Section 65(6) was added to the *Act* in 1995 by Bill 7, the *Labour Relations and Employment Statute Law Amendment Act*.[19] In introducing the bill, the Hon. Elizabeth Witmer, then Minister of Labour, described it as a "package of labour law reforms designed to revitalize Ontario's economy, to create jobs and to restore a much-needed balance to labour-management relations."[20] The Hon. David Johnson, Chair of the Management Board of Cabinet, stated that the amendments to provincial and municipal freedom of information legislation were "to ensure the confidentiality of labour relations information."[21]

[38] On proclamation of Bill 7, the Management Board of Cabinet responded with the following comments to the question of whether labour relations records will be excluded under the changes to the *Act*:

> Yes. This change brings us in line with the private sector. Previously, orders under the *Act* made some internal labour relations information available (e.g. grievance information, confidential information about

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[18] See *John Doe*, *supra* note 15. See also *Brockville (City) v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.) (*Brockville (City)).*

[19] S.O. 1995, c. 1, s. 82.

[20] Ontario, Legislative Assembly, Official Report of Debates (Hansard) (4 October 1995), as cited in *John Doe*, *supra* note 15 and *Brockville (City), supra* note 18.

[21] *Ibid*.

labour relations strategy, and other sensitive information) which could impact negatively on relationships with bargaining agents. That meant that unions had access to some employer labour relations information while the employer had no similar access to union information.[22]

[39] With respect to the purposes of the *Act*, section 1 states:

The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[40] In *John Doe*,[23] the Divisional Court upheld an IPC decision that found, in part, that records containing the full names of employees of the Family Responsibility Office (FRO) in the file of an individual who was subject to enforcement action by FRO were not excluded from the *Act* by section 65(6). In reaching its decision, the Court considered the legislative history of section 65(6) and the purposes of the *Act* and stated:

. . . [A] purposive reading of the *Act* dictates that if the records in question arise in the context of a provincial institution's operational mandate, such as pursuing enforcement measures against individuals, rather than in the context of the institution discharging its mandate *qua* employer, the s. 65(6)3 exclusion does not apply. *Excluding records that are created by government institutions in the course of discharging public responsibilities does not necessarily advance the legislature's objective of ensuring the confidentiality of labour relations information. However, it could have the effect of shielding government officials from public accountability, an effect that is contrary to the purpose of the Act.* The government's legitimate confidentiality interests in records created for the

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[22] Ontario, Management Board Secretariat, Bill 7 information package, employee questions and answers, (November 10, 1995), as cited in *John Doe* and *Brockville (City), supra* note 15 and 18.
[23] *Supra* note 15.

> purposes of discharging a government institution's specific mandate may be protected under exemptions in the *Act*, but not under s. 65(6).[24]
>
> [emphasis added]

[41] In my view, the principle of interpreting the section 65(6) exclusion in a manner that does not have the effect of shielding government officials from public accountability clearly applies to correctional officers and other staff whose actions have been recorded in some fashion (whether visually or in the form of written reports) in the course of discharging their public responsibilities. This does not mean that the section 65(6) exclusion is inapplicable to all records that relate to the actions or conduct of correctional staff. It simply means that it is important not to interpret the section 65(6) exclusion in an unduly broad manner that is contrary to the transparency purpose of the *Act*.

Section 65(6)1

[42] For section 65(6)1 to apply, the ministry must establish that the records were collected, prepared, maintained or used by the ministry itself or on its behalf in relation to proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the ministry.

[43] The term "labour relations" in section 65(6)1 refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to similar relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[25] The term "employment of a person" refers to the relationship between an employer and an employee.[26]

[44] As noted above, the ministry claims that the section 65(6)1 exclusion applies to the emails on pages 141 and 142, the employee/other information reports on pages 181- 183 and pages 321-323, parts or all of a series of use of force occurrence reports between pages 190 and 251, and the surveillance videos. However, I find later in my analysis that pages 181-183 and 321-323 of the records are excluded from the *Act* by section 65(6)3. As a result, it is not necessary to decide whether they are also excluded by section 65(6)1.

[45] This means that I must only determine whether the following records are excluded from the *Act* by section 65(6): the emails on pages 141-142,[27] the use of force

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[24] *Ibid*., para. 39.
[25] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[26] Order PO-2157.
[27] These emails from a manager to individual correctional officers direct them to comply with a ministry policy on the proper form to be filled out when force is used against an inmate.

occurrence reports found on pages 149 to 151[28] and pages 190 to 251, and the surveillance videos.

Summary of parties' representations

Ministry

[46] The ministry submits that it collected, prepared, maintained or used the two emails, use of force occurrence reports and surveillance videos in relation to anticipated proceedings before a tribunal relating to the employment of a person by the ministry.

[47] The ministry states that the records were "collected, prepared, maintained or used" by itself, as required by section 65(6)1. In particular, it submits that the records were created or used by its staff directly as a result of the inmate's death. If the incident leading to the death of the inmate had not occurred, the ministry says, the records would never have been created.

[48] Similarly, it submits that if it was not going to "use" the surveillance videos for employment-related purposes, the recording that it captures of the segregation area would have been automatically overwritten as is the case with other video footage taken of correctional institutions that is not required by the ministry for proceedings and other purposes.

[49] The ministry further states that because correctional staff are ministry employees, and therefore Crown employees, they are subject to the discipline process prescribed under the *Crown Employees Collective Bargaining Act, 1993*. It submits that it disciplined some employees involved in the altercation that led to the inmate's death, and these employees appealed the imposition of this discipline, which will result in a hearing before the Grievance Settlement Board (GSB). Based on the fact that a grievance appeal is underway, the ministry submits that the proceedings clearly meet the test of being "anticipated."

[50] The ministry submits, therefore, that the records are excluded from the *Act* by section 65(6)1, because they were collected, prepared, maintained or used by the ministry in relation to anticipated proceedings before a tribunal (the GSB) relating to the employment of a person by the ministry.

Correctional staff

[51] The correctional staff's representations largely support the ministry's interpretation of section 65(6)1. They state that it is common for legal proceedings to arise from use of force and significant issues in correctional facilities and for these

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[28] In its representations, the ministry does not claim that this particular use of force occurrence report is specifically excluded from the *Act* by section 65(6)1, even though it made this claim for all of the other use of force occurrence reports on pp. 190-251. In my view, however, this may be an oversight in the ministry's representations and I will consider whether this particular record is excluded from the *Act* by section 65(6)1.

issues to be the subject of arbitration proceedings before the GSB. They submit that the use of force occurrence reports, local investigation reports and other documents were collected, prepared and maintained at least in part in relation to proceedings or anticipated proceedings before the GSB, which means that they are excluded from the *Act* by section 65(6)1.

Appellant

[52] By contrast, the appellant argues that the records subject to the section 65(6)1 exclusion claim, such as the use of force occurrence reports and surveillance videos, were created in the ministry's role as the operator of a correctional centre. In other words, they are standard reports prepared in the context of a use of force or other incident and were not prepared in the context of an employment proceeding or labour relations matter. He further submits that the section 65(6)1 exclusion is not so broad that it effectively renders inaccessible to the public any record made in the day-to-day operations of an institution that could potentially become relevant in an employment-related proceeding.

[53] The appellant then challenges the ministry's position that the records were only collected, prepared, maintained or used by the ministry itself in relation to anticipated proceedings before the GSB relating to labour relations or to the employment of a person by the ministry. He submits that the videos, for example, were also maintained in the context of possible civil proceedings against the ministry, and would therefore have been maintained despite any anticipated hearing before the GSB, because of the prospect of civil litigation.

Ministry's reply

[54] In reply, the ministry submits that the appellant's "unreasonably narrow interpretation" of section 65(6) is not supported by the actual wording of the provision. It submits that the wording of section 65(6) plainly states that the exclusion applies to records "collected, prepared, maintained or used" by the ministry for proceedings or anticipated proceedings in relation to section 65(6)1 or for records relating to labour relations or employment related matters in which the ministry has an interest pursuant to section 65(6)3.

[55] It further submits that the fact that the exclusions specifically apply to records that are "collected" means that they implicitly apply to records which may have been "created" for a completely non-ministry and a non-employment purpose, but which were "collected" by, and are now being "used" by the ministry for one of the purposes listed in section 65(6). It asserts that the records that it claims are excluded are closely connected to the purposes set out in sections 65(6)1 and 3. It submits that the reason the records were created is not part of the tests that need to be met.

<u>Records analysis</u>

[56] I do not agree with the ministry's characterization of the records. In my view, the

two emails, the use of force occurrence reports and the surveillance videos are operational records that were created by the ministry in connection with its core mandate. Copies of these records were then "collected" by the ministry after they were created and subsequently "maintained or used" by it in relation to anticipated proceedings before the GSB.

[57] If the appellant had requested the correctional officers' discipline files, then these copies of the records may be excluded from the *Act* as part of that file by section 65(6)1. However, this does not mean that the original records are excluded from the *Act* by section 65(6)1 from the moment of their collection. In other words, they are operational records that would be expected to be maintained in the correctional service's record holdings, irrespective of any anticipated proceedings relating to the employment of a person.

[58] The ministry's broad view of the application of section 65(6)1 would exclude these operational records, many of which provide significant insight into the actions of those correctional officers and other staff involved in the altercation that led to the inmate's death. As noted above, the ministry submits that because section 65(6) specifically applies to records that are "collected," this means that it implicitly applies to records which may have been created for a completely non-ministry and a non•employment purpose, but which were "collected" by, and are now being "used" by the ministry for one of the purposes listed in section 65(6), such as anticipated proceedings before a tribunal.

[59] This broad interpretation runs contrary to the Divisional Court's decision in *John Doe* because it could shield from public accountability those correctional staff involved in the altercation that led to the inmate's death, an outcome that is contrary to the transparency purpose of the *Act*. In addition, the ministry's interpretive approach is inconsistent with a number of IPC orders and court decisions. Those decisions found that a distinction must be drawn between operational records created and kept by an institution in connection with its core mandate and copies of those records that are collected and used for a different purpose and kept in a different file or location.

[60] An important decision in this regard is Order PO-2494, in which then Assistant Commissioner Brian Beamish addressed whether OPP investigation records held by the Ministry of Community Safety and Correctional Services, including police officers' notes and witness statements, are exempt from disclosure under section 19(b) (solicitor-client privilege) of the *Act*. Although that decision is not about whether particular records are excluded from the *Act* by section 65(6), it contains a useful discussion about how institutions should characterize records, depending on their purpose, when interpreting the provisions of the *Act*.

[61] In his analysis, Assistant Commissioner Beamish found that even if police investigation records inserted into a Crown brief held in a Crown prosecutor's file are exempt from disclosure under section 19(b), the same records, found in the police's

investigation file, are not. He stated:

> The police prepared all of the records at issue for the purpose of investigating the matter involving the appellant, and deciding whether to lay criminal charges against her. This purpose is distinct from Crown counsel's purpose of deciding whether or not to prosecute criminal charges and, if so, using the records to conduct the litigation.
>
> In effect, police investigation records such as officers' notes and witness statements found in a Crown brief are "prepared" twice: first, when the record is first brought into existence, and second when the police, applying their expertise, exercise their discretion and select individual records for inclusion in the Crown brief, and then make copies of those records to deliver to Crown counsel.
>
> The fact that copies of some of the records found their way into the Crown brief does not alter the purpose for which the records were originally prepared . . .
>
> . . . .
>
> On first glance it may appear to be illogical to hold that privilege may apply to a record held in one location (*i.e.*, the Crown brief in the Crown prosecutor's files), but not to a copy of that record held in another location (*i.e.*, investigation files held by the police). However, courts have made findings of this nature with respect to solicitor-client privilege. For example, in *Hodgkinson v. Simms* (1989), 55 D.L.R. (4th) 577 at 589 (B.C.C.A.), the majority of the court stated:
>
>> . . . [W]here a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection . . .
>>
>> . . . It follows that the copies are privileged if the dominant purpose of their creation as copies satisfies the same test . . . as would be applied to the original documents of which they are copies. *In some cases the copies may be privileged even though the originals are not.* [emphasis added]
>
> I note that in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 at 360-361, 370 (C.A.), the majority of the Court of Appeal, in *obiter dicta*, agreed with the above statement [see also *R. v. CIBC Mellon Trust Co.* [2000] O.J. No. 4584 (S.C.)].

> Further, orders of this office have held that an exemption may apply to a document in one location, but not to a copy in another location [see, for example, Orders MO-1316, MO-1616, MO-1923].

[62] In *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*,[29] the Ontario Divisional Court upheld Order PO-2494.[30] Speaking for the Court, Swinton J. stated:

> The [ministry] submits that the IPC erred in the interpretation of s. 19(b), having misunderstood the role of the police: they are the investigative arm of the state, with the responsibility for investigating crime and compiling evidence for charges prosecuted by the Attorney General. Once copies of police records arising from an investigation are found in the Crown brief after criminal or quasi-criminal charges are laid, the records are exempt pursuant to s. 19(b). Such records were "prepared" for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.
>
> The respondent IPC submits that s. 19(b) applies only where the requester seeks access to the copies of the records contained in the Crown brief. It does not apply to records remaining in the hands of the police. To exempt those records from disclosure, the police must rely on other provisions of the *Act*, such as s. 14, which specifically deals with law enforcement.
>
> I agree with the submissions of the IPC. The [ministry's] interpretation of s. 19 of the *Act* is inconsistent with the terms of that provision and fails to take into account other provisions of the *Act* which provide exemptions that directly address the interests of the police in effective law enforcement.
>
> . . .
>
> In my view, the IPC orders to disclose the disputed records in the possession of the Ministry were correct. The fact that copies of the police records were in the possession of Crown counsel does not exempt the records from disclosure by the Ministry of Community Safety and Correctional Services, even though the same documents in the possession of the Ministry of the Attorney General would likely have been protected by Branch 2 of s. 19.[31]

[63] The distinction between records that are created and maintained in connection

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[29] 2009 CanLII 9740 (ON SCDC).
[30] The Court also upheld Reconsideration Order PO-2532-R and Order PO-2498.
[31] *Supra* note 29, paras. 13-15 and 24.

with an institution's core mandate, and copies of those records, which are collected and then used by that institution for another purpose, has also been applied in other IPC decisions in which the section 65(6) exclusion or the equivalent provision in section 52(3) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*)[32] is at issue.

[64] In Order M-927, Senior Adjudicator John Higgins addressed a claim by a municipal police service that because a complaint had been made about the conduct of their officers in investigating an accident, records in a police investigation file about the accident, such as officers' notes and witness statements, were excluded from *MFIPPA* by section 52(3)1 of the *Act*. The police reasoned that the complaint could trigger an investigation that would result in these records being collected and used by the police in relation to a possible proceeding under the *Police Services Act*. Senior Adjudicator Higgins rejected this argument and found the records were not excluded from the *Act* by section 52(3)1 for the following reasons:

> It is difficult to imagine any category of records which would be more integral to the basic mandate of a police force than the files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries, and related entries in officers' notebooks. Moreover, although some of them are prepared by employees of the Police, such records are not, in essence, related to employment or labour relations. Rather, they record the activities and conclusions of the investigating officers and, at times, others who conduct forensic analyses, etc. Generally speaking, such records are subject to the *Act*.
>
> It is an established principle of statutory interpretation that an absurd result, or one which contradicts the purpose of the enactment, is not a proper implementation of the Legislature's intention. In Driedger on the Construction of Statutes (3rd ed., Butterworths), by Ruth Sullivan, the author states (at page 89):
>
>> Legislative schemes are supposed to be elegant and coherent and operate in an efficient manner. Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme are likely to be labelled absurd.
>
> Applying section 52(3) to the information at issue in this appeal would have the effect of permanently removing certain information maintained by the Police with respect to their basic mandate (i.e. protection of the peace and investigation of possible criminal behaviour which comes to their attention) from the scope of the *Act*, while most information of this nature would remain subject to the *Act*. As noted above, this information

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[32] R.S.O. 1990, c. M.56.

> is not, in essence, related to employment or labour relations, and in my view, broadly speaking, it is to these latter categories of information that section 52(3) is intended to apply. Moreover, applying this section in the context of this appeal would result in the inconsistency that some files kept in connection with day-to-day police investigations of incidents occurring within the force's jurisdictional boundaries and related entries in officers' notebooks would be subject to the *Act*, while others would not be.
>
> In my view, therefore, it would be a manifestly absurd result, and one not intended by the Legislature, if the records at issue were removed from the scope of the *Act* because they happen to have been reviewed in connection with an investigation of an employee's conduct.
>
> On the other hand, in the context of a request for the file relating to an investigation of a police officer's conduct, where copies of incident reports, etc. from the original investigation formed part of that file, section 52(3) could apply to that entire file including those particular copies. However, in my view, the main investigation file housing the original incident reports, etc., and related officers' notebook entries, would remain subject to the *Act*.
>
> Accordingly, in the particular context of this request, I am not satisfied that the records at issue were prepared, collected, used or maintained by the Police, within the meaning of section 52(3)1, in relation to any proceedings or anticipated proceedings arising from the complaint about the handling of the case by the investigating officers [33]

[65] This line of reasoning has been adopted in a number of other IPC orders that have addressed whether the section 65(6)1 exclusion in the *Act* or the equivalent provision in section 52(3)1 of *MFIPPA* applies to operational records created by an institution in the course of its day-to-day business that are subsequently collected, prepared, maintained or used by that institution in proceedings.[34]

[66] For example, in Order MO-4119, the record at issue was video surveillance footage that the Waterloo Regional Police Service obtained from a transit company that showed the appellant being arrested by police. In assessing whether this record was excluded from by section 52(3) of *MFIPPA*, the adjudicator stated:

> . . . [T]he request was for the video surveillance footage of the arrest of the appellant, not for records related to the appellant's subsequent complaint into the police's conduct towards him during that arrest. Furthermore, based on the police's representations about the law

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[33] Pages 4-5.

[34] See, for example, Orders MO-2556, MO-3238 and MO-4119.

> enforcement exemption at section 8(1)(h) and the transit company's usual 72-hour retention period for the record, I can infer that the police received this record well before receiving the complaint about the officer's conduct (which was made several months after the arrest). Therefore, I find that the record relates to the police's initial interaction with the appellant (relating to a specific police occurrence number), and that its character does not change simply because it was and/or could later be collected, maintained or used by the police in relation to complaint investigations and/or other proceedings relating to the police's employees. Therefore, I find that the record does not relate to labour relations or to the employment of a person by the institution, under section 52(3)1 of the *Act*, or labour relations or employment related matters in which the institution has an interest, under section 52(3)3 of the *Act*.[35]

[67] I agree with the approach taken in these previous orders. In my view, two emails, the use of force occurrence reports and the surveillance videos that the ministry claims are excluded by section 65(6)1 are operational records that were first created by the ministry in connection with its core mandate. Copies were then "collected" by the ministry after they were created and, according to the ministry, were subsequently "used" by it in relation to anticipated proceedings before the GSB relating to the employment of a person.

[68] However, I find that the original records, which were created in connection with the ministry's core mandate, are not excluded from the *Act* by section 65(6)1, because they were not collected, prepared, maintained or used by the ministry in relation to anticipated proceedings before the GSB relating to the employment of a person by the ministry. The fact that the ministry may have collected and used copies of some of these records in relation to anticipated proceedings before the GSB is not sufficient for the section 65(6)1 exclusion to apply to the original records.

[69] The ministry's interpretative approach to the application of section 65(6)1 does not draw a distinction between operational records created and kept in accordance with an institution's core mandate and copies of those records that are collected and used for a different purpose in a different file or location. It submits, for example, that if it were not going to "use" the surveillance video of the segregation area, the recording that it captures would have been automatically overwritten, as is the case with other video footage taken in correctional institutions that is not required for proceedings and other purposes. In essence, the ministry is suggesting that the only reason this surveillance video was retained is because it was collected and used by the ministry in relation to anticipated proceedings before the GSB relating to the employment of a person by the ministry.

[70] I do not find this line of argument to be persuasive in establishing whether the

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[35] Para. 30.

records are excluded from the *Act* by section 65(6)1. The fact that the ministry has a retention policy that overwrites or deletes surveillance videos taken inside a correctional centre after a period of time does not negate the fact that they are operational records first created in connection to the ministry's core mandate. In addition, after the death of the inmate, the ministry was obliged to retain these videos and make copies available as evidence in any criminal investigation into the inmate's death or a possible civil action by the family, both of which subsequently occurred.

[71] In summary, I find that the following records are not excluded from the *Act* by section 65(6)1: the emails on pages 141-142, the use of force occurrence reports on pages 149 to 151 and pages 190 to 251, and the surveillance videos. I will now assess whether these and other records identified by the ministry are excluded from the *Act* by section 65(6)3.

Section 65(6)3

[72] For section 65(6)3 to apply, the ministry must establish that the records were collected, prepared, maintained or used by the ministry itself in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which it has an interest.

[73] The ministry submits that all of the same records that it claims are excluded under section 65(6)1, including the use of force occurrence reports and the surveillance videos, are also excluded from the *Act* under section 65(6)3. In addition, it claims that the following records are excluded under section 65(6)3: an employee/other information report on pages 91, 96-97, 103 and 321-323, on line communications on pages 92-95[36] and 98-100, occurrence reports on pages 101-102 and 108-117, a health insurance record on page 105, a Health and Productivity Program Accommodation Plan on pages 106-107, email correspondence on pages 123-125, 129-130, 132-133, 135-136, 138-139 and 141- 142, and parts of a use of force local investigation report on pages 313 and 316-317.

Summary of parties' representations

Ministry

[74] The ministry submits that it collected and used the records in relation to meetings, consultations, discussions or communications about "employment related matters" in which it has an interest, as required by section 65(6)3.

[75] With respect to the initial requirements of this provision ("the records were collected . . . or used by an institution or on its behalf in relation to meetings, consultations, discussions or communications"), the ministry makes similar arguments to those advanced under section 65(6)1.

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[36] Although the ministry claims that pp. 92-95 are excluded from the *Act* by section 65(6)3, its index of records indicates that it disclosed pp. 94-95 to the appellant.

[76] With respect to the latter requirements of this provision (the meetings, consultations, discussions or communications were "about labour relations or employment related matters in which the institution has an interest"), the ministry submits that the records are "employment related" (as opposed to labour relations related) because they relate "to the relationship between an employer and an employee." In addition, because the employment relationship is subject to the terms of a collective bargaining framework, the ministry submits that labour relations are a subtext for the creation of many of the records.

[77] The ministry claims there is a close connection between the creation and preparation of the records, and the subsequent use of the records in relation to future proceedings before the GSB, and for other employment related matters in which it has an interest. In particular, it submits that it has a strong "interest" in the following records because they go to the heart of its role as an employer in how it manages and directs its workforce:

- Concerns about employee safety – Pages 91-95 and 98-102 address concerns expressed about external threats made against staff. The ministry submits that the security and safety of staff while they are in the workplace are inherently of interest to the ministry, and to this end, relies upon Order PO-3723 which made a similar finding.

- Investigation into employee conduct – Pages 103 and 108-117 contain information related to a ministry investigation about an alleged unauthorized access of correctional files by an employee. The ministry maintains that an investigation of misconduct by its very nature satisfies the requirement of part 3 of the section 65(6)3 test. The ministry relies upon Order PO-3529, which came to the same conclusion regarding records investigating an allegation of misconduct.

- Health and accommodations records – Pages 105-107 contain correspondence regarding an employee's graduated return to work, as well as an accommodation plan for returning to work. The ministry submits that this kind of record easily falls within the scope of the third part of the section 65(6)3 test.

- Internal communications regarding the completion of Use of Force reports – The Ministry maintains that email communications on pages 123-125, 129-130, 132-133, 135-136, 138-139, 141-142, 313 and 316-317 contain internal correspondence directing staff on the completion of use of force reports. It submits that staff are mandated to complete use of force reports in their role as employees, when a use of force situation occurs. It submits that it has an obligation to provide direction to its employees as part of its role as employer, because it has an interest in the correct completion of these reports by its employees.

- Discipline hearings before the GSB – As with the records that it claims are excluded under section 65(6)1, the ministry maintains that all records being used for anticipated hearings before the GSB are of interest to the ministry. These include the use of force reports and surveillance videos. The ministry relies upon Order PO-1769, which found that a record related to a labour relations grievance which "has the capacity to affect [a ministry's] legal rights or obligations" falls within the threshold of section 65(6)3.

Correctional staff

[78] The correctional staff submit that the records were collected, prepared, maintained or used by the ministry in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the ministry has an interest, as required by section 65(6)3. They further submit that the IPC has held in a number of its decisions that records documenting investigations into police officers' conduct are excluded from the *Act* by section 65(6)3[37] and the reasoning in these decisions applies to the records at issue in this appeal.

Appellant

[79] The appellant disputes that the records were collected, prepared, maintained or used by the ministry in relation to meetings, consultations, discussions or communications about "employment related matters" in which the ministry has interest. He submits that the records were created at the time of the incident or shortly thereafter and relate to the day-to-day operation of the facility, not "employment-related matters." In other words, these records would have been prepared in any event under the correctional centre's normal operating procedures.

Records analysis

[80] For the reasons that follow, I find that the records identified by the ministry are excluded from the *Act* by section 65(6)3, except for an employee/other information report about a police investigation (pp. 96-97), a series of emails from a manager to individual correctional officers (pp. 123-125, 129-130, 132-133, 135-136, 138-139, 141-142, 313 and 316-317), the use of force occurrence reports (pp. 149-251 and 190-251) and the surveillance videos. These latter records are not excluded from the *Act* by section 65(6)3, because they were not collected, prepared, maintained or used by the ministry in relation to meetings, consultations, discussions or communications about "employment related matters" in which the ministry has an interest.

[81] At the outset, it is helpful to set out how previous IPC orders and court decisions have interpreted the meaning and scope of the wording in section 65(6)3.

"In relation to"

[82] Previous jurisprudence that has found that for the collection, preparation,

[37] Order PO-3098 and the cases cited at para. 130: Orders PO-2658, PO-2531, PO-2426, and PO-3075.

maintenance or use of a record to be "in relation to" one of the three subjects mentioned in section 65(6), there must be "some connection" between them.[38] In the circumstances of this appeal, this means that for section 65(6)3 to apply, the ministry's collection, preparation, maintenance and use of a record must have "some connection" to meetings, consultations, discussions or communications about labour relations or employment related matters in which the ministry has an interest.

[83] However, the "some connection" standard must involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context.[39] In my view, this would include applying the "some connection" standard in accordance with the principle established in *John Doe* that the section 65(6) exclusion not be interpreted in a manner that has the effect of shielding government employees from public accountability, an effect that is contrary to the transparency purpose of the *Act*.

"About"

[84] In *John Doe*, the Divisional Court found that the dictionary definition of the word "about" in section 65(6)3 requires that the record do more than have some connection to, or some relationship with, a labour relations or employment related matter. It stated that "about" means "on the subject of" or "concerning": see *Concise Oxford English Dictionary*, 11th ed., 2004, *s.v.* "about". This means that to qualify for the section 65(6)3 exclusion, the subject matter of the record must be a labour relations or employment- related matter.[40] It further stated:

> Adopting the Ministry's broad interpretation of "about" would mean that a routine operational record or portion of a record connected with the core mandate of a government institution could be excluded from the scope of the *Act* because such a record could potentially be connected to an employment-related concern, is touched upon in a collective agreement, or could become the subject of a grievance. This interpretation would subvert the principle of openness and public accountability that the *Act* is designed to foster.[41]

"Employment related matters"

[85] The ministry submits that for the purposes of section 65(6)3, the records are about "employment related matters" as opposed to matters relating to labour relations. The IPC has found that the term "employment related matters" in section 65(6)3 refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[42] This term has been found to apply in a number of contexts, including a job

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[38] *Supra* note 16.
[39] Order MO-3664, *Brockville (City), supra* note 18.
[40] *Supra* note 15 at para. 29.
[41] *Ibid.*, para. 30.
[42] Order PO-2157.

competition,[43] an employee's dismissal,[44] disciplinary proceedings under the *Police Services Act*,[45] a "voluntary exit program,"[46] and a review of "workload and working relationships."[47]

[86] However, both the IPC and the courts have found that that not all records documenting the actions or conduct of employees are in relation to meetings, consultations, discussions or communications about "employment related matters" for the purpose of section 65(6)3. For example, in *Goodis*, the Divisional Court stated that there is a distinction between employees' actions and employment-related matters. In particular, it found that that not all records documenting the actions or conduct of employees are "employment related matters" for the purpose of section 65(6)3, even if they are found in a civil litigation or complaint file, and that such a determination turns on examining the particular record at issue.[48]

"In which the institution has an interest"

[87] Finally, previous jurisprudence has found that the phrase "in which the institution has an interest" in section 65(6)3 means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce.[49]

[88] I will now turn to each of the records that the ministry claims are excluded from the *Act* by section 65(6)3 and will apply the principles established in previous IPC orders and court decisions.

Page 58 – Memorandum to staff

[89] This record is a memorandum to all correctional staff that reminds them that the ministry has an employee assistance program (EAP) that they can use. The ministry did not address this record in its representations but I find that it falls squarely within the section 65(6)3 exclusion, because it is a communication from management to employees about health and safety in the workplace, which is an "employment related matter." I find, therefore, that this record is excluded from the *Act* by section 65(6)3 because it was collected, prepared, maintained or used by the ministry in relation to discussions and communications about "employment related matters" in which the ministry has an interest.

Pages 91-93, 96-97, 98-100 and 101-102 – threat to correctional staff

[90] These records all deal with an internet post that contained a threat directed at correctional staff allegedly involved in the inmate's death.

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[43] Orders M-830 and PO-2123.
[44] Order MO-1654-I.
[45] Order MO-1433-F.
[46] Order M-1074.
[47] Order PO-2057.
[48] *Supra* note 17, paras. 23 and 29.
[49] *Ontario (Solicitor General) v. Mitchinson*, 2001 CanLII 8582 (ON CA) at paras. 34-35, leave to appeal refused [2001] S.C.C.A. No. 509.

[91] Pages 91-93 are an employee/other information report that is about a union representative bringing the threat to the attention of management at the correctional centre. Pages 98-100 and 101-102 contain similar information and also include occurrence reports filed by correctional employees that bring the threat to the attention of management.

[92] These records document discussions and communications between correctional employees, their union and management about the safety of employees both inside and outside the workplace, which is a human resources issue arising from the relationship between the ministry and its employees. In my view, this workplace safety issue is an employment related matter. Moreover, as the employer of correctional staff, the ministry clearly has an interest in managing threats that may impact the safety of its employees.

[93] I find, therefore, that these records are excluded from the *Act* by section 65(6)3 because they were collected, prepared, maintained or used by the ministry in relation to discussions and communications about “employment related matters” in which the ministry has an interest.

[94] However, pages 96-97 are an employee/other information report that is almost entirely about a police investigation into the threat and the outcome of that investigation. I find, therefore, that this record is not excluded from the *Act* by section 65(6)3, because it was not collected, prepared, maintained or used by the ministry in relation to discussions and communications about “employment related matters” in which the ministry has an interest. There is one sentence on page 96 that refers to the suspension of a named correctional officer and a related reference on page 97 that I will address below.

[95] In summary, I find that pages 91-93, 98-100 and 101-102 of the records are excluded from the *Act* by section 65(6)3 but pages 96-97 are not.

Pages 96-97 (part), 118-119 (part), 184-185 (part), 181-183 and 321-323 (in part) –suspension of correctional staff

[96] The ministry claims that parts of the above records are excluded from the *Act* by section 65(6)3.

[97] The IPC has consistently taken the position that the application of section 65(6) is record-specific and fact-specific.[50] This method of analysis has also been described as the “record-by-record approach” or “whole-record-based approach,” which means that when determining whether the section 65(6) exclusion applies, one must examine the record as a whole rather than looking at individual pages, paragraphs, sentences or words. In other words, only records as a whole can be excluded under section 65(6),

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[50] See, for example, Orders M-797, P-1575, PO-2531, PO-3572 and PO-3642.

not parts of records.[51] In Order MO-3798-I, the adjudicator cited a previous order that she had issued and explained why the exclusion cannot apply to parts of records:

> I observed in Order PO-3642 that this whole-record-based approach is consonant with the language of the exclusions, which applies to "records" that meet the relevant criteria. It also corresponds to the legislature's decision not to incorporate into the public sector freedom-of-information statutes a requirement for the severance of excluded records, in contrast to their treatment of records subject to exemptions.[52] If the legislature had intended that the exclusions in the *Act* be applicable to records in part, it could have said so explicitly, as it did in its health sector-specific privacy and access legislation.[53]

[98] Pages 181-183 and 321-323 are employee/other information reports. These records as a whole discuss and list all of the correctional staff whom the ministry suspended pending the internal investigation into the inmate's death. Although the ministry disclosed parts of pages 321-323, a substantial amount of this record contains information about those correctional staff who were suspended.

[99] The suspension of an employee by the ministry is clearly an "employment related matter" because it constitutes the deployment of a human resources tool by the employer with respect to an employee. I find, therefore, that these records are excluded from the *Act* by section 65(6)3 because they were collected, prepared, maintained or used by the ministry in relation to discussions and communications about "employment related matters" in which the ministry has an interest.

[100] Pages 96-97 are an employee/other information report that is almost entirely about a police investigation into a threat against correctional officers and the outcome of that investigation. I found above that that this record is not excluded from the *Act* by section 65(6)3.[54] However, there is one sentence on page 96 that refers to the suspension of a named correctional officer and a related reference to the same individual on page 97. Similarly, the ministry decided to disclose pages 118-119 and 184-185, which are inmate incident reports, but severed two sentences on pages 119 and 185, which refer to some correctional staff being suspended, under section 65(6)3.

[101] I find that because these records as a whole are not excluded from the *Act* by section 65(6)3, the brief parts of these records on pages 96, 97, 119 and 185 that refer to correctional staff being suspended cannot be excluded under this provision. Instead, I will determine below whether these parts of the records can be withheld under any of the exemptions claimed by the ministry.

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[51] See, for example, Orders MO-3163, PO-3572, PO-3642, Order PO-3893-I and PO-3943.
[52] Section 4(2) of *MFIPPA* and section 10(2) of *FIPPA*.
[53] Section 51(2) of the *Personal Health Information Protection Act, 2004*.
[54] Para. 94.

Pages 103-104, 105-107 and 108-117 – investigation into alleged misconduct/return-to- work plan

[102] All of these records relate to a correctional officer who was alleged to have inappropriately accessed and reviewed a file relating to the incident that resulted in the inmate's death.

[103] Pages 103-104 are an employee/other information report and pages 108-111, 112- 113, 114, and 115 are occurrence reports. These records all document the internal investigation that took place into the correctional officer's alleged misconduct or discussions that took place with her about workplace policy with respect to the handling of sensitive records.

[104] Pages 105-107 set out a graduated return-to-work plan that had been developed for the same correctional officer after they had been on leave from their position for a period of time. A return-to-work plan is clearly a human resources product arising from the employment relationship between the ministry and that employee.

[105] In my view, all of these records relate to discussions and communications about "employment related matters." I find, therefore, that pages 103-104, 105-107 and 108-117 of the records are excluded by section 65(6)3 because they were they were collected, prepared, maintained or used by the ministry in relation to discussions and communications about "employment related matters" in which the ministry has an interest.

Pages 123-125, 129-130, 132-133, 135-136, 138-139, 141-142, 313 (in part) and 316-317 (in part) – management direction to employees

[106] After the incident that resulted in the inmate's death, a number of correctional officers completed and filed occurrence reports, instead of use of force occurrence reports. These pages of the records are emails from a manager to individual correctional officers that directs them to follow a ministry policy for correctional institutions that mandates that a use of force occurrence report be completed and filed in certain circumstances.

[107] In my view, these communications from a manager to individual correctional officers are simply directions about the requirement to comply with a ministry policy on the proper form to be filled out when force is used against an inmate. These communications are not about the terms and conditions of employment or human resources questions.

[108] I find, therefore, that these records are not excluded by section 65(6)3 because they were not collected, prepared, maintained or used by the ministry in relation to discussions and communications about "employment related matters" in which the ministry has an interest.

[109] Specifically, I find that pages 123-125, 129-130, 132-133, 135-136, 138-139,

141- 142, 313 and 316-317 of the records are not excluded from the *Act* by section 65(6)3.

Use of force occurrence reports (pages 149-151 and 190-251) and surveillance videos

[110] In my analysis above, I found that the use of force occurrence reports and surveillance videos are operational records that are not excluded from the *Act* by section 65(6)1. I now turn to examine whether these records are excluded from the *Act* by section 65(6)(3).

[111] Although section 65(6)3 is broader in scope than section 65(6)1 (the latter only applies to "anticipated proceedings" or "proceedings" while the former applies to "meetings, consultations, discussions or communications"), the employment-related nexus is a requirement for both.

[112] As noted above, the ministry argues that the records being used for anticipated hearings before the GSB, such as the use of force occurrence reports and the surveillance videos, are of "interest" to the ministry for the purposes of section 65(6)3. It relies upon Order PO-1769, that found that a record related to a grievance which "has the capacity to affect [a ministry's] legal rights or obligations" falls within the threshold of section 65(6)3.

[113] The use of force occurrence reports filed by the correctional officers who were involved in the altercation that led to the inmate's death and the surveillance videos taken inside the correctional centre on the day the inmate died are operational records. Many of them shed considerable light on the incident that led to the inmate's death. In my view, the ministry's broad interpretation of section 65(6)3 runs contrary to the Divisional Court's decision in *John Doe* because it could have the effect of shielding the correctional staff involved in this incident from public accountability, an effect that is contrary to the transparency purpose of the *Act*.

[114] I have also considered the legislative history of the section 65(6) exclusion, which has been summarized in previous court decisions.[55] I find that it could not have been the intent of the Legislature to exclude from the *Act* all operational records documenting the conduct of correctional staff from the scope of the *Act*, particularly in cases in which an inmate has been seriously injured or died, simply because copies of those records are later used in relation to disciplinary matters.

[115] The main purpose of a use of force occurrence report is to document the actions or conduct of correctional staff in using force against an inmate.[56] Section 7 of Regulation 778 of the *Ministry of Correctional Services Act* states, in part:

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[55] *Supra* note 18.
[56] Section 7 of Regulation 778 of the *Ministry of Correctional Services Act*.

> (2) When an employee uses force against an inmate, the amount of force used shall be reasonable and not excessive having regard to the nature of the threat posed by the inmate and all other circumstances of the case
>
> (3) Where an employee uses force against an inmate, the employee shall file a written report with the Superintendent indicating the nature of the threat posed by the inmate and all other circumstances of the case.

[116] These are strictly operational directions. In addition, the existence of the regulation underscores the fact that they are part of the facility's operational mandate.

[117] Similarly, the purpose of a surveillance video in a correctional centre is not simply to protect the security of the facility but also to document what transpires in that facility. Neither of these purposes is on its face an "employment related matter."

[118] As established in *Goodis*, "employment related matters" are separate and distinct from matters related to employees' actions. Not all records documenting the actions or conduct of employees are "employment related matters" for the purpose of section 65(6)3, even if they are found in a civil litigation or complaint file, and such a determination turns on examining the particular record at issue.[57]

[119] In my view, a distinction must be drawn between operational records that simply document the actions or conduct of the correctional staff in question, which, in accordance with *Goodis*, would not necessarily be about "employment related matters" under section 65(6)3, and records that go beyond simply documenting that conduct and are about "employment related matters" under section 65(6)3, because they relate to human resources or staff relations issues arising from the relationship between the ministry and that employee. The latter records could include, for example, an internal investigation report that discusses whether an employee should be disciplined or records that document the actual discipline that was imposed on an employee.[58]

[120] The ministry has a public responsibility to document what occurs in correctional institutions, which leads to the creation of operational records such as use of force occurrence reports and surveillance videos. These operational records would have been created and brought into existence whether or not the ministry decided to investigate and discipline certain correctional staff who were involved in the altercation that led to the inmate's death.

[121] For section 65(6)3 to apply, the ministry must establish that the records were collected, prepared, maintained or used by itself in relation to meetings, consultations, discussions or communications "about" labour relations or employment related matters in which it has an interest.

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[57] *Supra* note 17 at para 29.
[58] These types of records are not at issue in this appeal.

[122] As noted above, the Divisional Court in *John Doe* stated that the term "about" in section 65(6)3 means "on the subject of" or "concerning," which means that to be excluded from the *Act*, the subject matter of the record must be a labour relations or employment-related matter.[59] It further stated that "about" should not be interpreted in a broad manner that would mean that a routine operational record or portion of a record connected with the core mandate of a government institution could be excluded from the scope of the *Act* because such a record could potentially be connected to an employment- related concern, is touched upon in a collective agreement, or could become the subject of a grievance. Such an interpretation would subvert the principle of openness and public accountability that the *Act* is designed to foster.[60]

[123] In my view, the fact that a copy of a use of force occurrence report or surveillance video is later used by the ministry in a disciplinary process, which is an "employment related matter," does not change the fact that these are operational records that were originally created in connection with the ministry's core mandate and for a purpose that is not "employment related."

[124] As a result, I find that neither the use of force occurrence reports nor the surveillance videos are excluded from the *Act* by section 65(6)3, because they were not collected, prepared, maintained or used by the ministry in relation to meetings, consultations, discussions or communications about labour relations or employment related matters in which the ministry has an interest.

[125] However, the fact that these records are not excluded by section 65(6) and are therefore subject to the access scheme in the *Act* does not mean that they must be automatically disclosed. They may still be subject to the exemptions in sections 12 to 22, which protect various governmental and third party interests. Below, I will assess whether the ministry has properly withheld these and other records under various exemptions in the *Act*, including the personal privacy exemption in section 21(1) and the law enforcement exemptions in sections 14(1)(b), (e), (i), (j), (k) and (l).

B. Do the records contain "personal information" as defined in section 2(1) and, if so, whose personal information is it?

[126] The ministry claims that there is information relating to correctional staff and other individuals in the withheld records and parts of records that is exempt from disclosure under the personal privacy exemption in section 21(1) of the *Act*. The section 21(1) exemption only applies to "personal information." Consequently, it must first be determined whether the information relating to correctional staff and other individuals that the ministry has withheld from the certain records is "personal information."

[127] Section 2(1) of the *Act* gives a list of examples of personal information:

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[59] *Supra* note 40.
[60] *Supra* note 41.

> "personal information" means recorded information about an identifiable individual, including,
>
> > (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
> >
> > (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
> >
> > (c) any identifying number, symbol or other particular assigned to the individual,
> >
> > (d) the address, telephone number, fingerprints or blood type of the individual,
> >
> > (e) the personal opinions or views of the individual except if they relate to another individual,
> >
> > (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
> >
> > (g) the views or opinions of another individual about the individual, and
> >
> > (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[128] The list of examples of personal information under section 2(1) is not a complete list. This means that other kinds of information could also be "personal information."[61]

[129] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[62] In addition, section 2(3) of the *Act* states:

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[61] Order 11.
[62] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

> (3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[130] In some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[63]

Summary of parties' representations

Ministry

[131] The ministry claims that the withheld records contain personal information within the meaning of the expansive, non-exhaustive definition in section 2(1) of the *Act*. It submits that this personal information belongs to correctional staff, inmates, and members of the public who wrote to the minister. It further states that this personal information is found in correctional records as well as in external correspondence sent to the minister by members of the public.

[132] With respect to those records subject to a section 65(6) exclusion claim, the ministry submits that they contain significant amounts of personal information belonging to employees who were investigated or who were interviewed by their employer, or who had submitted mandatory use of force reports resulting directly or indirectly from the tragic incident involving the inmate.

[133] The ministry submits that this information is "personal" and not professional or business identity information within the meaning of section 2(3) of the *Act*. In particular, it submits that the information in the records is "inherently personal" and as such qualifies as the employees' personal information.

[134] The ministry points out that the records reveal the names and positions held by employees and their involvement in the incident. It submits that this personal information includes but is not limited to:

- records of employee discipline (e.g. page 181);
- descriptions of the emotional or personal state of an employee during the incident (e.g., page 151)
- information about employees being allegedly assaulted (e.g., page 191); and
- recollections by employees of other employees' actions during the incident (e.g., page 197).

[63] Orders P-1409, R-980015, PO-2225 and MO-2344.

Correctional staff

[135] The correctional staff submit that the withheld records contain the personal information of the correctional centre's employees, including correctional officers and nurses. They state that various reports include these individuals' names and the surveillance videos contain their images. They submit that this identifying information is their personal information in accordance with paragraph (c) of the definition of personal information in section 2(1).

[136] They further submit that the records include details of these individuals' employment history, involvement in any prior incidents, and past training. They submit that such information is personal information in accordance with paragraph (b) of the definition of personal information in section 2(1).

[137] They also submit that occurrence reports filed by correctional staff, which contain their full names, positions and often other identifying details, are made with the explicit understanding that they are private and confidential. They submit that the same considerations apply to the nurses who complete medical documents and charting. They submit that these records contain personal information in accordance with paragraph (f) of the definition of personal information in section 2(1).

[138] They further assert that the records include reports that contain the views of individual correctional staff members about the involvement of other staff and medical records that contain health care assessments and opinions. They submit that such information is personal information in accordance with paragraph (g) of the definition of personal information in section 2(1).

[139] Finally, they submit that correctional officers and nurses, in their official capacity, do not release their full name to inmates or the families and friends of inmates. In performing their duties, they take steps to prevent the release of their full names. They submit that the exception in s. 2(3) should not be applied to give members of the public more information through a request under *Act* than they would receive if dealing with correctional staff in their official capacity.

Appellant

[140] The appellant submits that pursuant to section 2(3) of the *Act*, personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. He disputes the ministry's claims that the information about correctional staff in the records is nevertheless "personal" because it would reveal something of an inherently personal nature" about those individuals.

[141] The appellant states that the ministry does not specify further what kind of "inherently personal" information could be revealed. He asserts that this blanket assertion is not sufficient to bring the information about correctional staff within the

definition of "personal information" in section 2(1) of the *Act*.

Analysis and findings

[142] For the reasons that follow, I find that the withheld records and parts of records contain the "personal information" of numerous individuals, including:

- the deceased inmate,
- other inmates in the correctional centre, and
- private citizens.

[143] I also find that the information about correctional staff in the withheld records and parts of records is largely their professional information (not personal information), but there is some information about them that qualifies as their "personal information" as that term is defined in section 2(1) of the *Act*.

Deceased inmate

[144] There is a substantial amount of information in the withheld records and parts of records about the deceased inmate that constitutes his "personal information," as that term is defined in section 2(1). The deceased inmate's name appears with other personal information relating to him in employee/other information reports (pp. 96-97), and use of force occurrence reports (pp. 149-151, 190-251). Images of the deceased inmate also appear in parts of the surveillance videos taken inside the correctional centre. The information about him in these records falls within paragraphs (a), (b), (c), (g) and (h) of the definition of "personal information" in section 2(1).

Other inmates

[145] Some of the withheld records and parts of records also contain the personal information of other inmates in the correctional centre. There are references to these other inmates, who are identified by name (e.g., pp. 180, 194, 208 and 212) and by their name and Offender Tracking Information System (OTIS) number (pp. 316-317). I find that this information is their "personal information, because it falls within paragraphs (b), (c) and (h) of the definition of that term in section 2(1).

Private citizens

[146] The withheld records and parts of records also contain the personal information of a number of private citizens who previously had some type of association with the deceased inmate. These individuals are identified by name in several records including two OTIS content profiles (pp. 18 and 286-288) and two warrants remanding a prisoner (pp. 290 and 292). I find that the information about these individuals falls within paragraph (h) of the definition of "personal information" in section 2(1).

[147] The records also include a letter from a private citizen to the minister about the inmate's death (pp. 343-348) and a reference to a letter from the minister to a private citizen (p. 324-325). These private citizens are identified by name in these letters, which also contain their home mailing addresses and their views and opinions. I find that this information is their "personal information" because it falls within paragraphs (d), (e), (f) and (h) of the definition of that term in section 2(1).

Correctional staff

[148] There is a considerable amount of information in the withheld records and part of records about correctional staff, including correctional officers, senior staff (sergeants, deputy superintendents, etc.) and medical staff (health care managers, nurses, team leads, a psychologist, etc.). These records include occurrence reports (pp. 59, 131, 168), an AED event form (p. 65), emails (pp. 123-125, 129-130, 132-133, 135-136, 138-139, 141-142), employee/other information reports (pp. 96-97), use of force occurrence reports (pp. 149-151, 190-251) and surveillance videos.

[149] In my view, the information about correctional staff in these withheld records and parts of records is largely their professional information (not personal information), but there is some information about them that qualifies as their "personal information" as that term is defined in section 2(1).

<u>Professional information</u>

[150] Many of the records identify correctional staff by their name and job title, such as correctional officer or nurse, and also describe or depict their conduct. For example, the numerous use of force occurrence reports filed by individual correctional staff describe both their own conduct and that of other correctional staff in the incident that led to the inmate's death. Similarly, the surveillance videos show numerous correctional staff, many of whom are identifiable, and also depict their conduct on the day the inmate died.

[151] Under paragraph (b) of the definition in section 2(1), personal information includes an individual's "employment history." Consequently, at the outset, I will address whether the records contain the "employment history" of any correctional staff.

[152] Previous IPC orders have found that the term "employment history" in paragraph (b) of the definition of personal information in section 2(1) requires that the information relates to the identifiable individual's past duties or employment.[64] In the circumstances of this appeal, correctional staff are identified in their existing, not their past, employment positions at the time the records were created. Consequently, I find that any references to their names and job titles or their duties does not constitute their "employment history" for the purposes of paragraph (b) of the definition of personal information in section 2(1).

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[64] Orders PO-3310 and P-61.

[153] Moreover, with respect to the names and job titles of these correctional staff, section 2(3) of the *Act* explicitly excludes such information from the definition of "personal information." It states that personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity. The names and job titles of the correctional staff in the use of force occurrence reports and other records identify them in a professional capacity, which means that such information is not their "personal information."

[154] I am not persuaded by the correctional staff's submission that section 2(3) should not be applied because correctional officers and nurses, in their professional capacity, do not release their full name to inmates or the families and friends of inmates. Section 2(3) does not contain such an exception.

[155] However, in some situations, even if information relates to an individual in a professional, official or business capacity, it may still be "personal information" if it reveals something of a personal nature about the individual.[65] Consequently, the names and job titles of the correctional staff, coupled with information about their conduct, might still qualify as their personal information if it reveals something of a personal nature about those individuals.

[156] At the outset, it is important to highlight the distinction between records that provide a description, narrative, account or depiction of the conduct of correctional staff when these individuals were on the job and carrying out their professional duties (e.g., use of force occurrence reports, video surveillance, etc.) and those records that evaluate their conduct (e.g., police investigation reports, ministry investigation reports, disciplinary records, etc.). The former records are at issue in this appeal but the latter records, with one possible exception, are not.

[157] A number of previous IPC orders have found that information in records that evaluates or investigates the conduct of individuals identified in a professional, official or business capacity is their personal information because it reveals something of a personal nature about them.[66] In my view, however, information in records that simply provides a description, narrative, account or depiction of the conduct of individuals identified in a professional, official or business capacity and does not evaluate or investigate their conduct, is not their personal information because it does not reveal something of a personal nature about them.

[158] In the circumstances of this appeal, I find that the withheld records and parts of records contain information that provides a description, narrative, account or depiction of the actions and conduct of correctional staff rather than an evaluation or investigation of their conduct. This finding is reinforced by the contents of these

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[65] Orders P-939, P-1409, R-980015, PO-2225 and MO-2344.

[66] Orders P-721, M-720, P-939, P-1318, P-1409, PO-1772, PO-1912, PO-2414, PO-2516 and PO-2524.

records. For example, the use of force occurrence reports provide the following instructions to correctional staff:

> Use of force reports must include:
>
> - An account of the events leading to the Use of Force being specific regarding inmate(s) behavior and with any action either taken or attempted to resolve the situation by the writer and others involved in the incident.
>
> - An accurate and precise description of the incident including the reasons for employing force and of the techniques used. The description should also be specific regarding inmate(s) behavior and with any action either taken or attempted to resolve the situation by the writer and others involved in the incident.
>
> - A description of the weapon used by the inmate, if any, and the manner in which it was used.
>
> - A description of injuries received, if any, and the manner in which it was used.
>
> - A list of all participants and witnesses to the incident.
>
> [emphasis added]

[159] Subject to one exception set out below, I find that that the numerous use of force occurrence reports provide a description, narrative, account or depiction of the actions and conduct of correctional staff rather than an evaluation or investigation of their conduct. Similarly, the surveillance videos simply depict the actions and conduct of correctional staff on the day the inmate died in various parts of the correctional centre. They do not constitute an evaluation or investigation of their conduct and do not reveal something of a personal nature about any correctional staff.

[160] In summary, I find that the information in the withheld records and part of records that provides a description, narrative, account or depiction of the conduct of correctional staff when they are carrying out their professional duties, does not reveal something of a personal nature about them that would cause such information to cross over into the realm of "personal information."

[161] I find, therefore, that the names and job titles of correctional staff and the description, narrative, account or depiction of their conduct in most of the withheld records and parts of records does not constitute their "personal information," as that term is defined in section 2(1) of the *Act*. Rather, it constitutes their professional information. These records and parts of records include occurrence reports (pp. 59, 131, 168), an AED event form (p. 65), employee/other information reports (pp. 96-97),

use of force occurrence reports (pp. 149-151 and 193-251) and surveillance videos.

[162] A number of emails (pp. 123-125, 129-130, 132-133, 135-136, 138-139, 141-142) from a manager to individual correctional officers direct them to follow a ministry policy for correctional institutions that mandates that a use of force occurrence report be completed and filed in certain circumstances. In my view, these emails are operational records that simply point out that correctional officers initially filled out the wrong form, without evaluating the conduct of these individuals. They do not reveal something of a personal nature about these individuals that would cause professional instructions of this nature to cross over into the realm of "personal information."

[163] Because the information about correctional staff in most of the above records is not their "personal information," it cannot be exempt from disclosure under the personal privacy exemption in section 21(1) of the *Act*. However, I will assess under Issue D below whether the information about correctional staff in the withheld records and parts of records, including their names, are exempt from disclosure under the law enforcement exemption in 14(1)(e).

Personal information

[164] Although the information about correctional staff in the withheld records and parts of records is largely their professional information (not personal information), there is some information about them that qualifies as their "personal information" as that term is defined in section 2(1) of the *Act*.

[165] There is one use of force occurrence report (pp. 190-192) submitted by a sergeant that contains information that evaluates the conduct of correctional staff. The withheld parts of this record contain a summary of the actions of correctional staff in the incident that led to the inmate's death but also contain the sergeant's view of the alleged violations of ministry policy that occurred. In my view, this information is evaluative and raises questions about the conduct of certain correctional staff. I find, therefore, that this information reveals something of a personal nature about these individuals, which causes it to cross over into the realm of "personal information."

[166] Some parts of the records reveal the emotional state of named correctional staff, particularly in relation to the incident that led to the inmate's death. The parts of the records that contain this information include an occurrence report (p. 59) and some use of force occurrence reports (e.g., pp. 151, 194 and 219). Although the other information relating to these individuals in such records is largely about them in their professional capacity, the information about their emotional state reveals something of a personal nature about them and it is, therefore, their "personal information." In particular, I find that this information falls within paragraph (h) of the definition of "personal information" in section 2(1).

[167] The name of a correctional officer who was suspended from his position appears

on pp. 96-97. This information raises questions about his conduct in the incident that led to the inmate's death. In my view, the information about his suspension reveals something of a personal nature about him and therefore causes it to cross over from professional information into the realm of "personal information." I find that this information falls within paragraph (h) of the definition of "personal information" in section 2(1). There are also two sentences on pages 119 and 185 which refer to some unnamed correctional staff being suspended, but I find that this not the personal information of any of these individuals because this information is not identifiable.

[168] Finally, in one part of a use of force occurrence report, a correctional staff person describes a health ailment that she has (p. 219). I find that this information is her "personal information" and falls within paragraph (b) of the definition of that term in section 2(1).

C. Does the mandatory personal privacy exemption at section 21(1) apply to the withheld personal information in the records?

[169] I have found that the withheld records and parts of records contain the personal information of the deceased inmate, other inmates and a number of private citizens. Some limited parts of the records also contain the personal information of correctional staff. It must now be determined whether the personal information of these individuals is exempt from disclosure under the mandatory personal privacy exemption in section 21(1) of the *Act*.

[170] Where a requester seeks records containing the personal information of another individual, section 21(1) prohibits an institution from disclosing this information unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies. In the circumstances, it appears that the only exception that could apply is section 21(1)(f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > (f) if the disclosure does not constitute an unjustified invasion of personal privacy.

[171] Sections 21(2), (3) and (4) help in deciding whether disclosure would or would not be an unjustified invasion of personal privacy.

Summary of parties' representations

Ministry

[172] The ministry submits that the exception in paragraph (f) of section 21(1) does not apply because disclosing the personal information of correctional staff, other inmates and private citizens in the records would constitute an unjustified invasion of

their personal privacy.

Presumptions

[173] The ministry submits that the presumptions in section 21(3)(d) and (g) apply to many of the records containing personal information. These presumptions state:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> (d) relates to employment or educational history;
>
> (g) consists of personal recommendations or evaluations, character references or personnel evaluations.

[174] The ministry submits that the personal information in the records includes the "employment history" of correctional workers from December 2016 or later, and that disclosing this personal information is presumed to be an unjustified invasion of their personal privacy. This employment history includes the employees' responsibilities in responding to the incident that subsequently required completion of a use of force occurrence report.

Factors

[175] The ministry further submits that the factors in sections 21(2)(e), (f) and (h) apply to the personal information of correctional staff, other inmates and private individuals. These provisions state:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
>
> (f) the personal information is highly sensitive;
>
> (h) the personal information has been supplied by the individual to whom the information relates in confidence.

[176] The ministry submits that the factor in section 21(2)(e) applies to the personal information of correctional staff because disclosing it may expose them to harm, based on at least one threat that was posted on social media. It further submits that harm to correctional staff may result if the personal information that is disclosed leads to their actions being misrepresented, which could lead to harassment or worse.

[177] With respect to the factor in section 21(2)(f), the ministry submits that the

personal information of correctional staff in the records is "highly sensitive" and that disclosing it could be expected to cause them "significant distress." It further submits that the personal information of other inmates is "highly sensitive" and that disclosing it would link these individuals to their own incarceration in a correctional institution.

[178] Finally, the ministry submits that the factor in section 21(2)(h) applies to the personal information of correctional staff. It states that correctional staff supplied the use of force occurrence reports, which includes their personal information, in confidence to the ministry.

Correctional staff

[179] The correctional staff submit that the exception in paragraph (f) of section 21(1) does not apply because disclosing records containing their personal information would constitute an unjustified invasion of their personal privacy.

Presumptions

[180] As with the ministry, the correctional staff submit that the presumption in sections 21(3)(d) and (g) apply to the records containing their personal information. However, they also claim that the presumption in section 21(3)(b) applies to their personal information. This presumption states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[181] The correctional staff submits that the presumption in section 21(3)(b) applies to the personal information of correctional officers and nurses in the use of force occurrence reports, because they filed these reports as part of an internal investigation by the ministry to determine whether there had been a violation of institutional policies and procedures, but also section 7 of Regulation 778 of the *Ministry of Correctional Services Act*.

[182] With regard to the presumption in section 21(3)(d), the correctional staff submit that the records could include references to the experience of the officers involved, including their employment history, how they have handled similar matters in the past, and what training they received relevant to the incident on December 15, 2016.

[183] Finally, with respect to the presumption in section 21(3)(g), the correctional staff submit that the records could include evaluations of their conduct on the day in question.

<u>Factors</u>

[184] The correctional staff largely support the ministry's claim that the factors in sections 21(2)(e), (f) and (h), which weigh in favour of privacy, apply to their personal information in the records. However, they also submit that the factor in section 21(2)(i) also applies to their personal information. This provision states:

> A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (i) the disclosure may unfairly damage the reputation of any person referred to in the record.

[185] The correctional staff submit that if their personal information in the requested records is disclosed, it could be used to attempt to unfairly damage their reputation. They submit that this is particularly concerning as some of the information may be taken out of context by those who are unfamiliar with the duties and responsibilities of correctional staff and the settings in which they work.

Appellant

[186] The appellant disputes the ministry's claim that the factor in section 21(2)(h) applies to the personal information of correctional staff in the records. He submits that to the extent that the personal information reveals an individual's involvement in the criminal justice system, it may be appropriate to sever identifying information but to disclose the remainder of the records. However, the justification that the personal information reveals an individual's involvement in the criminal justice system should only apply to inmates' information, and not to staff information, if any is asserted to be highly sensitive under section 21(2)(h).

Analysis and findings

[187] For the reasons that follow, I find that the personal information of the deceased inmate in the withheld records and parts of records is not exempt from disclosure under section 21(1), because in accordance with section 21(4)(d), disclosing it to the appellant is desirable for compassionate reasons. However, I find that the personal information of other inmates and private citizens in the withheld records and parts of records is exempt from disclosure under section 21(1), because disclosing it to the appellant would constitute an unjustified invasion of their personal privacy. In addition, I find that the limited parts of the records that contain the personal information of correctional staff is exempt from disclosure under section 21(1).

Section 21(4)(d)

[188] The appellant is the father of the deceased inmate, which triggers the possible

application of the compassionate reasons provision in section 21(4)(d) of the *Act*. This provision states:

> Despite subsection (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,
>
> > (d) discloses personal information about a deceased individual to a spouse or close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons.

[189] If the requirements of section 21(4)(d) are met, the personal information of a deceased individual cannot be exempt from disclosure under section 21(1), because disclosing it does not constitute an unjustified invasion of their personal privacy as per 21(1)(f), despite the presumptions in section 21(3).

[190] For the reasons that follow, I find that section 21(4)(d) applies to the personal information of the deceased inmate in the records and parts of records withheld by the ministry. As a result, disclosing this personal information to the appellant does not constitute an unjustified invasion of the deceased inmate's personal privacy under section 21(1)(f).

[191] In its first supplementary decision letter to the appellant, the ministry stated that it had considered the compassionate reasons provision in section 21(4)(d) of the *Act* and decided to disclose a number of records and parts of records to the appellant containing the deceased inmate's personal information, including health care records, a staff memo, an AED event form, employee/other information reports, occurrence reports, inmate incident reports, and some use of force occurrence reports and use of force local investigation reports. Consequently, the compassionate reasons provision in section 21(4)(d) was first invoked by the ministry itself at the access request stage.

[192] The deceased inmate's personal information is found in many of the other records and parts of records withheld by the ministry that are at issue in this appeal, including employee/other information reports (pp. 96-97), and use of force occurrence reports (pp. 149-151, 190-251). Parts of the surveillance videos taken inside the correctional centre also contain his personal information.

[193] Section 21(4)(d) provides for the disclosure of the personal information of a deceased individual, if disclosure to a "close relative" would be desirable for compassionate reasons.

[194] In order for this section to apply, the following conditions must apply:

1. the records must contain the personal information of someone who has died,

2. the requester must be a spouse or "close relative" of the deceased individual, and

3. the disclosure of the personal information of the deceased individual must be desirable for compassionate reasons given the circumstances of the request.[67]

[195] The parties did not provide detailed representations on section 21(4)(d). However, in my view, the three conditions for satisfying the requirements of section 21(4)(d) are easily met in this appeal.

[196] First, the withheld records and parts of records clearly contain the personal information of someone who has died. That individual is the appellant's son, who died at Central East Correctional Centre on December 15, 2016 after an altercation with correctional staff.

[197] Second, the appellant is indisputably a "close relative" of the deceased inmate, as required by section 21(4)(d). The term "close relative" is defined in section 2(1) of the *Act* as including a parent. Here, the appellant is the father of the deceased inmate.

[198] Third, there is no doubt that disclosing the deceased inmate's personal information to his father is desirable for compassionate reasons given the circumstances of the access request. The withheld records and parts of records that contain the deceased inmate's personal information, particularly the use of force occurrence reports, shed considerable light on how the altercation with correctional staff led to his death. In my view, disclosing the deceased inmate's personal information to the appellant is desirable for compassionate reasons because it will assist him in the grieving process by providing him with a better understanding of how and why his son died in the altercation with correctional staff.

[199] I find, therefore, that section 21(4)(d) applies to the personal information of the deceased inmate in the records and parts of records withheld by the ministry.

[200] Personal information about an individual who has died can include information that also belongs to another individual. However, the overall circumstances must be considered when deciding whether the disclosure of information under section 21(4)(d) would interfere with that individual's right to privacy.[68]

[201] The records and parts of records withheld by the ministry also include the personal information of other inmates and some private citizens. In addition, some limited parts of the records contain the personal information of correctional staff. I find that disclosing this personal information, which is mixed into the same records as the deceased's inmate's personal information, is not desirable for compassionate reasons under section 21(4)(d).

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[67] Orders MO-2237 and MO-2245.

[68] Order MO-2237.

[202] In short, I find that disclosing the deceased inmate's personal information in the records and parts of records withheld by the ministry to the appellant does not constitute an unjustified invasion of his personal privacy because I am satisfied, in the circumstances, that the disclosure is desirable for compassionate reasons under section 21(4)(d). This personal information is found in many of the records and parts of records withheld by the ministry, including an occurrence report (p. 59), employee/other information reports (pp. 96-97), use of force occurrence reports (pp. 149-151, 190-251), and parts of the surveillance videos. Because section 21(4)(d) applies to this personal information, it is not exempt from disclosure under section 21(1).

Presumptions

[203] It must now be determined whether the personal information of other inmates, private citizens and correctional staff in the withheld records and parts of records is exempt from disclosure under section 21(1) or whether other reasons justify the exception under section 21(1)(f).

[204] The presumptions in sections 21(3) must be considered in deciding whether disclosing these individuals' personal information to the appellant would constitute an unjustified invasion of their personal privacy. If these individuals' personal information does not fit within any presumptions under section 21(3), I must next consider the factors set out in section 21(2) to determine whether or not disclosing it would constitute an unjustified invasion of their personal privacy.

[205] I am not persuaded by the ministry's claim that the presumptions in sections 21(3)(d) and (g) apply to the personal information of correctional staff in the records, nor by the correctional staff's claim that both presumptions plus the one in section 21(3)(b) apply to their personal information.

[206] These claims are based on the premise that the use of force occurrence reports, the surveillance videos and other records contain the personal information of correctional staff. However, I have found that the information about correctional staff in these withheld records and parts of records is largely their professional information, not their personal information. Consequently, these presumptions cannot apply to that information.

[207] I have found that some limited parts of the records contain the personal information of correctional staff, including the information that reveals their emotional state after the incident that resulted in the inmate's death; a correctional staff person's description of a health ailment that she has; the name of a correctional officer who was suspended from his position; and information in a sergeant's use of force occurrence report that evaluates the conduct of some correctional staff.

[208] The correctional staff submit that the presumption in section 21(3)(b), which covers personal information that was compiled and is identifiable as part of an

investigation into a possible violation of law, applies to their information in the records. They argue that the personal information in the use of force occurrence reports was compiled as part of an investigation into a possible violation of section 7 of Regulation 778 of the *Ministry of Correctional Services Act*.

[209] I note that the ministry did not claim that the section 21(3)(b) presumption applies to the personal information of correctional officers in any records. In addition, previous IPC jurisprudence has found that use of force reports prepared by police officers are not compiled as part of any investigation. Rather, they are created in response to specific statutory requirements and they are used by senior officials within the police service to ensure that incidents involving the use of force are managed in a manner consistent with established standards and procedures.[69]

[210] In my view, there is insufficient evidence before me to find that the section 21(3)(b) presumption applies to the limited personal information of correctional staff in the use of force occurrence reports. In addition, I find that none of the presumptions in section 21(3) apply to the personal information of other inmates and private citizens in the records.

Factors

[211] I must next consider the factors set out in section 21(2) to determine whether or not the personal information of other inmates and private citizens and the limited personal information of correctional staff in the withheld records and parts of records fall into the exception in section 21(1)(f). Section 21(2) lists several factors that may be relevant to determining whether disclosing these individuals' personal information to the appellant would constitute an unjustified invasion of their personal privacy.[70] Some of these factors weigh in favour of disclosure, while others weigh against disclosure.

[212] The ministry and the correctional staff claim that a number of the factors weighing against disclosure apply to this personal information, including sections 21(2)(e), (f), (h) and (i). The appellant has not claimed that any of the section 21(2) factors weighing in favour of disclosure apply to this personal information.

[213] If no factors favouring disclosure are present, the section 21(1) exemption — the general rule that personal information must not be disclosed — applies because the exception in section 21(1)(f) has not been established.[71] Based on my review of the records and parts withheld by the ministry, I am satisfied that none of the factors weighing in favor of disclosure applies to the personal information of other inmates, private citizens and correctional staff in the withheld records and parts of records.

[214] In these circumstances, I find that disclosing these individuals' personal

[69] Order PO-1912.
[70] Order P-239.
[71] Orders PO-2267 and PO-2733.

information to the appellant would constitute an unjustified invasion of their personal privacy and it is exempt from disclosure under section 21(1). This includes the following personal information in the withheld records and parts of records:

- references to other inmates, who are identified by name (e.g., pp. 180, 194, 208 and 212) and by name and OTIS number (pp. 316-317);
- references to private citizens who previously had some type of association with the deceased inmate (pp. 18, 286-288, 290 and 292);
- a letter from a private citizen to the minister about the inmate's death (pp. 343-348) and a reference to a letter from the minister to a private citizen (pp. 324-325);
- information in a sergeant's use of force occurrence report that evaluates the conduct of some correctional staff (pp. 190-192);
- the emotional state of named correctional staff, particularly in relation to the incident that led to the inmate's death (pp. 59, 151, 194 and 219);
- the name of a correctional officer who was suspended from his position (pp. 96-97); and
- a correctional staff person's description of a health ailment that she has (p. 219).

D. Do the discretionary law enforcement exemptions at sections 14(1)(b), (e), (i), (j), (k) and/or (l) apply to the withheld information in the records?

[215] The ministry claims that the discretionary law enforcement exemptions at sections 14(1)(b), (e), (i), (j), (k) and/or (l) apply to specific records and parts of records that it withheld. These provisions state:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > . . .
> >
> > (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
> >
> > . . .
> >
> > (e) endanger the life or physical safety of a law enforcement officer or any other person;
> >
> > . . .

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(j) facilitate the escape from custody of a person who is under lawful detention;

(k) jeopardize the security of a centre for lawful detention; or

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[216] The section 14(1) exemptions apply where a certain event or harm "could reasonably be expected to" result from disclosure of the record.

[217] The law enforcement exemption must be approached in a sensitive manner, because it is hard to predict future events in the law enforcement context, and so care must be taken not to harm ongoing law enforcement investigations.[72]

[218] However, the exemption does not apply just because a continuing law enforcement matter exists,[73] and parties resisting disclosure of a record cannot simply assert that the harms under section 14(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed.[74]

[219] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[75] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[76]

Summary of parties' representations

Ministry

<u>Section 14(1)(b) (law enforcement investigation)</u>

[220] The ministry states that the records and parts of records that it has withheld are exempt from disclosure under section 14(1)(b) because disclosing them could reasonably be expected to interfere with an OPP investigation undertaken with a view

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[72] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[73] Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.
[74] Orders MO-2363 and PO-2435.
[75] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[76] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

to a law enforcement proceeding or from which a law enforcement proceeding is likely to result.

[221] The ministry states that Ontario's Chief Pathologist released a report in August 2021, which contained findings as to why the inmate died. It adds that the report has been turned over to the OPP, which is reviewing the report and may initiate an investigation. The ministry submits that given the current unknowns about a future OPP investigation, it is prudent and cautious for the records be treated at this time as though an investigation is occurring.

Section 14(1)(e) (endanger life or safety)

[222] The ministry submits that some of the records and parts of records that it has withheld are exempt from disclosure under section 14(1)(e), because disclosing them could reasonably be expected to endanger the life or physical safety of correctional staff. In particular, it states that it is concerned that the records may expose correctional staff to harm based, in part, on at least one threat that was posted on social media and that is contained on page 98 of the records.

[223] The ministry further states that it is concerned about the harm to correctional staff that may result, if the information that is disclosed leads to their actions being misrepresented, which could lead to employee harassment or worse. It cites one Facebook page which states that, "The chief pathologist made it clear that guards killed him."

[224] The ministry asserts that the chief pathologist has not accused the guards of "killing" the inmate, which suggests action and intent, but instead he provided a more nuanced perspective as to the causes of the inmate's death. It submits that the use of inflammatory and potentially misleading language may arouse emotions to the potential detriment of the safety of staff. The ministry further submits that once the records are disclosed, there are no subsequent restrictions on their use, meaning they can be posted anywhere and anytime.

Sections 14(1)(i), (j), (k) (security) and (l) (facilitate commission of an unlawful act)

[225] The ministry claims that some of the records and parts of records that it has withheld are exempt from disclosure under sections 14(1)(i), (j), (k) and (l). It submits that because these exemptions are similar, in the context of this appeal, it has grouped them together with respect to a number of records.

[226] In its initial representations, the ministry states that it has applied these exemptions to the following records: parts of pages 18, 121-122, 126-127, 131, 134, 137, 140, 143, 148, 154, 168, 174, 175, 180, 253-257, 259, 261-264, 266-277, 279-280, 288, 313, 316-317 and 337.

[227] The ministry states that the following information is exempt from disclosure

under these provisions:

- Codes: The ministry states that a number of pages (e.g., page 121) contain the name of a code that is used internally in its correctional institutions during an emergency. It states that it has protected this code out of concern that knowledge of it could contribute to a breach of correctional security, were it to fall into the wrong hands. It submits that it has exempted this code for the same reason that it does not disclose police ten codes, such as the one that is listed on page 168, a practice that has been repeatedly upheld in IPC orders (e.g., Order PO-3742 at paragraph 52).

- Hours of employment: The ministry states that it has exempted the shift schedules of employees (e.g., page 131) on the basis that revealing them would reveal when shifts change, and this could therefore jeopardize security by revealing potential vulnerabilities in the correctional institution.

- Description of response to emergency: The ministry states that it has exempted parts of several pages (e.g., page 154) on the basis that they reveal the response to an emergency code, which again could be expected to reveal a potential vulnerability in correctional institutions, were the information to be disclosed.

[228] In its supplementary representations, the ministry submits that sections 14(1)(i) and (k) apply to a number of records as a whole, including use of force occurrence reports. It states that correctional staff are required to submit reports to management in correctional services, and in return, it protects these reports from disclosure. It submits that if it became known that the reports were subject to disclosure in the manner contemplated by this appeal, it could result in staff self-censoring their reports. It submits this outcome would harm ministry operations, which rely heavily upon use of force occurrence reports and other reports.

<u>Exercise of discretion</u>

[229] The ministry submits it has acted appropriately in exercising its discretion under the section 14(1) exemptions to not disclose law enforcement information contained in records that are the subject of this appeal. It further submits that it provided the appellant with a broad right of access to many of the records, and achieved an appropriate balance consistent with the principles of the *Act*.

Correctional staff

<u>Section 14(1)(e) (endanger life or safety)</u>

[230] The correctional staff submit that those records and parts of records that reveal their identity are exempt from disclosure under section 14(1)(e), because disclosing them could reasonably be expected to endanger their lives or physical safety.

[231] They state that correctional officers and nurses keep their identity confidential from inmates and the family of inmates. They point out that correctional officers provide care, custody and control for individuals convicted of and/or charged with serious crimes, while nurses provide medical care to this population. They claim that inmates are often hostile towards them and blame them for various day-to-day issues, particularly given their obligation to enforce rules and control and monitor the activities of inmates.

[232] They further submit that disclosing the records and parts of records withheld by the ministry will provide the public with the full names and identities of the correctional staff involved. This information could then be further disseminated, and their identities could be disclosed on a much broader basis. They submit that by making such information public, the correctional staff involved could be subjected to threats and retaliation from inmates whom they have been responsible for.

[233] They then refer to a number of threats and other statements that were posted on Twitter about the inmate's death, including:

- "To the guards who are responsible for Soli's death. We are coming for you".
- "He was killed by the actions of corrections officers" and "There is no longer any excuse for allowing these guards to get away with murder."

[234] The correctional staff point out that in addition to these tweets, there was a Facebook page which identified the inmate and stated that he was "murdered by the guards."

[235] As supporting evidence, the correctional staff attached copies of these social media posts to their representations. They submit that these posts underscore the serious threat to health and safety if any identifying information is disclosed with respect to the correctional staff involved.

[236] They also cite previous jurisprudence, including *Duncanson v. Fineberg*,[77] where the Divisional Court upheld an IPC decision not to disclose the names of all officers of the Metro Toronto Police Force on the basis that the police force had shown that disclosure could reasonably be expected to make the police officers' work more dangerous and acknowledged that it was possible that "identification could place family members at risk." The correctional staff submit that they should be extended these same protections and considerations.

[237] The two correctional managers and the correctional staff person who submitted representations in related appeal MA17-716 make similar arguments and express particular concern that members of the public may be able to locate and harm them and their families if their identities are disclosed. The correctional staff person further

[77] 1999 CanLII 18726 (ON SCDC).

submits that she may face retaliation from other correctional staff if her forthright account of the incident that led to the inmate's death is disclosed. She submits that there is a "code of silence" within the correctional facility and that other staff would deem that she did not follow it when writing her use of force occurrence report. She states:

> . . . I stand behind my actions on the day in question as well as my statement; however I worry for my safety and believe that the release of this information may cause retaliation from some of my colleagues who are vocal about their belief that 14 correctional officers were wrongly suspended following the death of this particular individual.

Appellant

Section 14(1)(b) (law enforcement investigation)

[238] The appellant submits that the OPP's criminal investigation has now concluded and is no longer relevant to this appeal. He states that no charges were laid and there is no reasonable expectation that disclosing the records and parts of records withheld by the ministry could interfere with an ongoing or anticipated law enforcement investigation or proceeding.

Sections 14(1)(i), (j), (k) (security) and (l) (facilitate commission of an unlawful act)

[239] The appellant submits that the ministry's approach to these section 14(1) exemptions casts the net far too widely. He asserts that the ministry has failed to provide sufficient evidence to support its bald assertions that disclosing the records and parts of records that it has withheld could reasonably be expected to result in the harms contemplated by sections 14(1)(i), (j), (k) and (l).

[240] With respect to the code in the records that the ministry has withheld, the appellant submits that to the extent that this code calls for emergency medical assistance, for example, its disclosure could not reasonably be expected to contribute to a breach of security if it "fell into the wrong hands". He submits that unlike police codes, codes in correctional facilities are more likely to be used in the presence of inmates and therefore are likely already to be public knowledge.

[241] With respect to the remaining types of information that the ministry has withheld under sections 14(1)(i), (j), (k) and (l), including the hours of employment of correctional staff and the description of staff response to an emergency code, the appellant submits that the ministry has failed to provide sufficient evidence to withhold such information under those exemptions.

Exercise of discretion

[242] The appellant submits that the ministry has not exercised its discretion

appropriately in refusing to disclose a number of records under the section 14(1) exemptions. He asserts that the exemptions from the right of access in the *Act*, including section 14(1), should be limited and specific and not applied more broadly than necessary. He submits that the ministry's exercise of discretion in applying section 14(1) has undermined its obligation to disclose as many records as possible.

Analysis and findings

[243] For the reasons that follow, I find that some records and parts of records are exempt from disclosure under the section 14(1) exemptions claimed by the ministry, but others are not.

Section 14(1)(b) (law enforcement investigation)

[244] This exemption gives the ministry the discretion to refuse to disclose a record if the disclosure could reasonably be expected to interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result. For the reasons that follow, I find that section 14(1)(b) does not apply to the records and parts of records withheld by the ministry because there is no longer an ongoing police investigation into the inmate's death.

[245] For section 14(1)(b) to apply, the law enforcement investigation in question must be a specific, ongoing investigation. The exemption does not apply where the investigation is completed, or where the alleged interference is with "potential" law enforcement investigations.[78] The investigation in question must actually exist or be ongoing.[79]

[246] The police have investigated the death of inmate three times and decided not to lay charges at the conclusion of each of these investigations. The first investigation was conducted by the KLPS and the second by the OPP. After the release of the Chief Pathologist's report into the death of the inmate, the OPP revisited its criminal investigation into the inmate's death. However, it later advised the family that there were insufficient grounds to lay criminal charges against any correctional staff.

[247] Given that there is no specific ongoing police investigation into the death of the inmate, I find that disclosing the records and parts of records withheld by the ministry could not reasonably be expected to interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result. I find, therefore, that these records and parts of records are not exempt from disclosure under section 14(1)(b).

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[78] Order PO-2085.
[79] Order PO-2657.

Section 14(1)(e) (endanger life or safety)

[248] This exemption gives the ministry the discretion to refuse to disclose a record if the disclosure could reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person. For the reasons that follow, I find that section 14(1)(e) does not apply to the records and parts of records withheld by the ministry that identify correctional staff by name because disclosure could not reasonably be expected to endanger their lives or physical safety.

[249] For section 14(1)(e) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to endanger someone's life or physical safety. A person's subjective fear, or their sincere belief that they could be harmed, is important, but is not enough on its own to establish this exemption.[80]

[250] In my view, there is no dispute that the wording of section 14(1)(e) ("a law enforcement officer or any other person") is broad enough to cover correctional staff if the requirements of the exemption are met.

[251] The death of the inmate after an altercation with correctional staff and the subsequent lack of any criminal charges produced an outpouring of grief from his family but also anger and frustration from some members of the public, who believe that correctional staff were responsible for his death. In their representations, both the ministry and the correctional staff have pointed to several social media posts to support their position that disclosing the records and parts of records that identify the correctional staff could reasonably be expected to endanger their lives or physical safety.

[252] For example, one individual on Twitter posted a tweet in February, 2017 which stated, "To the guards who are responsible for Soli's death. We are coming for you." Other social media posts suggested that correctional staff "murdered" the inmate and should be held accountable.

[253] In assessing whether this evidence is sufficient to establish that disclosing the records and parts of records that identify the correctional staff could reasonably be expected to endanger their lives or physical safety, I find that there are two important considerations that should be taken into account.

[254] First, the ministry has already disclosed numerous records, some in full and others in part, to the appellant, including employee/other information reports, occurrence reports, inmate incident reports, and some use of force occurrence reports and use of force local investigation reports. The names and other information relating to many of the correctional staff who were on duty on the day the inmate died, including correctional officers, managers and health care staff, appear in these records and were disclosed to the appellant. There is no evidence that this disclosure has

[80] Order PO-2003.

resulted in any endangerment to the lives or physical safety of these correctional staff.

[255] Similarly, the ministry has already disclosed the use of force occurrence report of the correctional staff person who fears that she may face a threat to her safety from the public and retaliation from her colleagues if records that identify her are disclosed. There is no evidence that this disclosure has resulted in any endangerment to her life or physical safety.

[256] Second, the police investigated the February, 2017 threat on Twitter that was directed towards correctional staff. They concluded that there was no evidence that any of the correctional staff involved in the incident were in any immediate danger and closed their investigation.[81]

[257] In my view, both of these considerations weigh against finding that disclosing the records and parts of records withheld by the ministry that identify correctional staff could reasonably be expected to endanger their lives or physical safety under section 14(1)(e).

[258] I am also not convinced by the correctional staff's argument that the Divisional Court's findings in *Duncanson* are applicable to the particular correctional staff whose names appear in the records and parts of records withheld by the ministry. In that case, the Court upheld an IPC decision that had found that a list of all officers employed by the Metropolitan Toronto Police was exempt from disclosure under section 14(1)(e). The correctional staff state that they keep their identities confidential from inmates and the family of inmates for safety reasons and that they should be extended the "same protections and considerations" as the police officers in *Duncanson*.

[259] In *John Doe*, the Court of Appeal discussed *Duncanson* and emphasized the importance of taking a case-by-case approach with respect to whether disclosing the names of police officers and other public servants could reasonably be expected to lead to the harms set out in section 14(1)(e). It stated:

> At para. 55, the Divisional Court noted that *Duncanson* is not authority for the proposition that demonstration of a generalized risk is sufficient in all cases. The Court in *Duncanson* recognized that whether generalized risk is sufficient is dependent on the facts of each case.[82]

[260] In my view, the facts here are distinguishable from those in *Duncanson*, and I do not accept that the correctional staff whose names appear in the withheld records and parts of records face a generalized risk that would trigger the application of the section 14(1)(e) exemption. In *Duncanson*, the record at issue listed the names of all police officers employed by the Metropolitan Toronto Police, including those who work undercover and in other sensitive positions. Here, the records and parts of records

[81] Page 96 of the records.
[82] *Ontario (Ministry of Community and Social Services) v. John Doe* 2015 ONCA 107 (CanLII), para. 21.

withheld by the ministry only contain the names of those correctional staff in Central East Correctional Centre who were on duty on the day of the incident that resulted in the inmate's death.

[261] In addition, the correctional staff's claim that they face a generalized risk that triggers the application of the section 14(1)(e) exemption is belied by the fact that in response to the appellant's access request, the ministry disclosed records and parts of records to the appellant that contain the names of numerous correctional officers, managers and health care staff. As indicated above, there is no evidence that this disclosure has resulted in any endangerment to the lives or physical safety of these correctional staff.

[262] I find, therefore, that in the particular circumstances of this appeal, the correctional staff who are identified in the records and parts of records withheld by the ministry do not face a generalized risk that would trigger the application of the section 14(1)(e) exemption.

[263] I accept the correctional staff's assertion that for safety reasons, they do not share their full names with inmates or families of inmates. However, their position here is that they should remain anonymous even after being involved in or having witnessed an altercation with an inmate that resulted in his death. This runs contrary to the principles of transparency and accountability that underpin freedom-of-information legislation in Ontario.

[264] In *John Doe*, the Court of Appeal discussed previous Supreme Court of Canada jurisprudence on the meaning of the phrase "could reasonably be expected to" in the context of section 14(1)(e). It stated:

> The Supreme Court has clarified what is meant by "could reasonably be expected to" where that phrase appears in the *Act* including in ss. 14(1)(e) and 20 . . . The Court held . . . that the "could reasonably be expected to" standard provides "a middle ground between that which is probable and that which is merely possible." It went on to write, at para. 54:
>
> > An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground.[83]

[265] I find that neither the ministry nor the correctional staff has provided evidence that is "well beyond" or "considerably above" a mere possibility of harm in order to reach the middle ground that would trigger the application of the section 14(1)(e) exemption for the withheld records and parts of records that identify the correctional staff. These records include the use of force occurrence reports and surveillance videos.

[83] *Ibid.*, para. 25, citing *Ontario (Community Safety and Correctional Services), supra* note 76.

[266] In summary, I find that the records and parts of records withheld by the ministry that identify correctional staff are not exempt from disclosure under section 14(1)(e).

Sections 14(1)(i), (j), (k) (security) and (l) (facilitate commission of an unlawful act)

[267] These exemptions give the ministry the discretion to refuse to disclose a record if the disclosure could reasonably be expected to result in the harms set out in those provisions.

[268] For section 14(1)(i) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required.

[269] For section 14(1)(j) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to facilitate the escape from custody of a person who is under lawful detention.

[270] For section 14(1)(k) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to jeopardize the security of a centre for lawful detention.

[271] For section 14(1)(l) to apply, there must be a reasonable basis for concluding that disclosure of the information at issue could be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[272] For the reasons that follow, I find that the emergency code and the inmates' cell numbers are not exempt from disclosure under any of these provisions. However, I find that the following information is exempt from disclosure under section 14(1)(k): the description of a specific procedure that correctional staff follow when responding to an emergency code, the work telephone numbers of staff, and the hourly schedule of staff.

[273] In addition, I find that the parts of the surveillance videos that show the layout of the correctional centre are exempt from disclosure under section 14(1)(k) and that for most of these videos, the non-exempt information (the images of the deceased inmate and the correctional staff) cannot reasonably be severed and disclosed. However, I find that the video that shows the inmate being brought to his cell in the segregation unit by correctional officers and what happened in that hallway both before and after he died, can reasonably be severed under section 10(2) in a manner that shows him and all of the correctional staff but that obscures the cells on either side of the hallway.

[274] Finally, I find that the various reports that are at issue, such as the use of force occurrence reports, are not exempt from disclosure under sections 14(1)(i) or (k).

Emergency code

[275] The ministry has withheld an "emergency code" from numerous records, although I note that it appears to have inadvertently disclosed this code in at least one of the records that it disclosed to the appellant.

[276] I am not convinced that disclosing this particular code could reasonably expected to lead to the harms set out in sections 14(1)(i), (j), (k) and (l). A simple google search of this code in association with words such as "Faqiri," "in prison system," or "in correctional system" reveals that this code and its meaning in correctional institutions in Ontario is in the public domain and has been referred to in the media articles. I find, therefore, that disclosing this particular code could not reasonably be expected to "contribute to a breach of correctional security," as claimed by the ministry or lead to any of the harms set out in the exemptions in sections 14(1)(i), (j), (k) and (l).

Procedure for responding to emergency code

[277] The ministry has withheld parts of the records that describe a specific procedure that correctional staff follow when responding to the emergency code (e.g., pp. 148, 150, 154, 192 and 248). In my view, disclosing a procedure that shows what steps staff take in response to an emergency code could be used by inmates with criminal intent to breach the centre's security. I find, therefore, that this information is exempt from disclosure under section 14(1)(k), because disclosing it could reasonably be expected to jeopardize the security of a centre for lawful detention.

Phone number

[278] The ministry has withheld the parts of those records that reveals the work telephone number of correctional staff. This information appears, for example, on pp. 65, 123, 125, 129, 132, 135, 138, 141, 187 and 208. Although the work phone numbers of public servants are generally publicly available, I am satisfied that correctional staff are differently situated, and that this information could be used by individuals with criminal intent to breach the centre's security. I find, therefore, that this information is exempt from disclosure under section 14(1)(k), because disclosing it could reasonably be expected to jeopardize the security of a centre for lawful detention.

Hourly schedule of staff

[279] The ministry has withheld parts of the records that reveal the hourly schedule of staff (e.g., pp. 131, 197, 204, 215, 221, 228, 245, 248 and 279). In my view, disclosing information that documents the movement of staff in and out of the correctional centre could be used by individuals with criminal intent to breach the centre's security. I find, therefore, that this information is exempt from disclosure under section 14(1)(k), because disclosing it could reasonably be expected to jeopardize the security of a centre for lawful detention.

Cell numbers of inmates

[280] In the records that it disclosed to the appellant, the ministry generally did not sever the cell numbers in the correctional centre. (e.g., pp. 118 and 154). However, in one use of force occurrence report (p. 157) the same cell number appears four times. In the copy of this record that it disclosed to the appellant, the ministry appears to have severed two of these references but not the other two, which are identical. In its representations, the ministry does not address whether the cell numbers are exempt from disclosure under sections 14(1)(i), (j), (k) or (l).

[281] Given the absence of such evidence and the fact that the ministry has already disclosed cell numbers in a number of records that it disclosed to the appellant, I find that such information is not exempt from disclosure under sections 14(1)(i), (j), (k) or (l).

Surveillance videos

[282] The ministry has withheld all of the surveillance videos under sections 14(1)(i), (j), and (l). These include:

- Several video clips starting at 1:09 p.m. of the inmate being pushed in a wheelchair through various areas of the correctional centre by correctional staff.
- Video of a security office in the correctional centre. This one hour and 27 minute video starts at 2:57 p.m. and shows correctional staff in the office but also numerous staff in a hallway outside the office.
- A one hour and 21 minute video starting at 3:03 p.m. of the hallway of a segregation unit with cells on either side. It starts with the inmate being brought to his cell by correctional staff. This video does not directly show the altercation that then happened inside the cell that led to his death. However, it shows numerous correctional staff going up and down the hallway and in and out of the inmate's cell.

[283] The IPC has found in previous orders that those parts of a surveillance video that reveal the layout of a correctional facility are exempt from disclosure under section 14(1)(k) because disclosing them could reasonably be expected to jeopardize the security of a centre for lawful detention.[84] This is based on the premise that it is reasonable to expect that such information could be used by individuals with criminal intent to breach the centre's security.

[284] However, these orders have also found that it must be determined whether the video can be reasonably severed under section 10(2) of the *Act* using obscuring software to protect the exempt parts that show the layout of the correctional facility

[84] Orders PO-2332 and PO-3905.

while disclosing the images of individuals that are not exempt from disclosure. The reasonable severance requirement in section 10(2) states, in part:

> If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 . . . the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

[285] The video clips showing the inmate being pushed in a wheelchair through various areas of the correctional centre all show the layout of the correctional centre in significant detail. The video of a security office in the correctional centre reveals this particular office's layout and location.

[286] The video of the segregation unit hallway provides the most detailed look at what transpired before, during and after the altercation that resulted in the inmate's death. Although this hallway looks exactly as one might reasonably expect a segregation unit to look like, it also reveals the number of cells in this special unit of the correctional centre and how they are arranged.

[287] I find that the parts of all the videos that reveal the layout of various areas of the correctional centre, including the cells and how they are arranged in the segregation unit, are exempt from disclosure under section 14(1)(k), because disclosing them could reasonably be expected to jeopardize the security of a centre for lawful detention. However, I find that the parts of these videos that show the inmate and correctional staff are not exempt from disclosure under section 14(1)(k) or any other exemption.

[288] I am not convinced that most of these videos can reasonably be severed under section 10(2) using obscuring software in a manner that would protect the exempt parts showing the layout of the correctional centre, while disclosing the non-exempt images of the inmate and correctional staff. In my view, such a severing exercise would produce incoherent videos with little transparency value, particularly for the video clips of the inmate being pushed in a wheelchair around the correctional centre and the video of the security office.

[289] I find, however, that the video of the segregation unit hallway can reasonably be severed under section 10(2) in a manner that obscures the cells on either side of the hallway, which are exempt from disclosure under section 14(1)(k), but that discloses the non-exempt images of the inmate before he died and the correctional staff before, during and after the incident that resulted in the inmate's death. Consequently, I will order the ministry to disclose a severed version of this video to the appellant.

Use of force occurrence reports and other reports

[290] As noted above, the ministry submits that a number of records as a whole, including the use of force occurrence reports and other types of reports, are exempt

from disclosure under sections 14(1)(i) and (k). It claims that if correctional staff know that such reports will be publicly disclosed, they will engage in self-censorship when writing them, which would "harm ministry operations."

[291] In my view, the ministry's argument is unconvincing and also contradictory because it disclosed a number of these reports to the appellant. After receiving the appellant's access request, it disclosed several occurrence reports and use of force occurrence reports to him. If the ministry believed that disclosing such reports would "harm ministry operations" because staff will censor themselves when drafting future reports, it presumably would not have exercised its discretion to disclose any of them.

[292] Moreover, I find that disclosing these records could not reasonably be expected to lead to the actual harms set out in sections 14(1)(i) and (k), namely:

- endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required; or
- jeopardize the security of a centre for lawful detention.

Exercise of discretion

[293] I have found that some information in the records is exempt from disclosure under section 14(1)(k), including the hourly schedule of staff, the work telephone numbers of staff, the description of how staff respond to the emergency code, and the parts of the videos that reveal the layout of various areas of the correctional centre.

[294] The section 14(1)(k) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so.

[295] In addition, I may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose,
- it takes into account irrelevant considerations, or
- it fails to take into account relevant considerations.

[296] In either case, I may send the matter back to the institution for an exercise of discretion based on proper considerations.[85] I may not, however, substitute my own

[85] Order MO-1573.

discretion for that of the institution.[86]

[297] I am satisfied that the ministry exercised its discretion and did so properly in deciding to withhold some information from the records under section 14(1)(k). I find that it took into account relevant considerations, and there is no evidence before me to suggest that it took into account irrelevant considerations or that it exercised its discretion in bad faith or for an improper purpose. As a result, I uphold the ministry's exercise of discretion to withhold the information in those parts of the records that I have found exempt from disclosure under section 14(1)(k).

E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 21(1) exemption?

[298] I have found that most of the information about correctional staff in the records and parts of records withheld by the ministry is their professional information (not their personal information) and it therefore cannot be exempt from disclosure under section 21(1). However, I have found that some limited parts of the records contain the personal information of correctional staff that is exempt from disclosure under section 21(1).

[299] I have also found that the personal information of other inmates and private citizens in the records and parts of records withheld by the ministry is exempt from disclosure under section 21(1).

[300] The appellant claims that there is a compelling public interest in disclosing the records that clearly outweighs the purpose of the section 21(1) exemption. It must therefore be determined whether the public interest override in section 23 applies to the records and parts of records that contain the personal information of these above individuals.

[301] Section 23 of the *Act* provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

> An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, **21** and 21.1 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[302] For section 23 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[303] The public interest override in section 23 cannot be invoked for those records

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[86] Section 54(2) of *FIPPA*.

that I have found are excluded from the *Act* by section 65(6). It also cannot apply to those records and parts of records that I have found are exempt from disclosure under section 14(1)(k), because that exemption is not one of those listed in section 23 that can be overridden.

[304] The parties provided detailed representations on section 23 but most of their arguments focus on the records and parts of records that I have already found must be disclosed to the appellant because they are not excluded from the *Act* by section 65(6) and also not exempt from disclosure under section 21(1) or any of the section 14(1) exemptions claimed by the ministry.

[305] In considering whether there is a "public interest" in disclosing a record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[87] In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[88] The IPC has defined the word "compelling" in section 23 as "rousing strong interest or attention."[89]

[306] With two exceptions, I am not convinced that there is a compelling public interest in disclosing the parts of the records that I have found exempt from disclosure under section 21(1) that contain the personal information of correctional staff, other inmates and private citizens. In my view, disclosing these parts of the records would not, in a meaningful way, inform or enlighten the citizenry about the conduct of correctional staff and shed light on the incident that led to the inmate's death. Consequently, I find that the public interest override in section 23 does not apply to those parts of the records.

[307] The two exceptions are the information in a sergeant's use of force occurrence report (pp. 190-192) that evaluates the conduct of some correctional staff (i.e., their alleged violations of ministry policy), and the information in several withheld records that reveals the emotional state of certain correctional staff (e.g., pp. 59, 151, 194 and 219). I have found that this information is the personal information of those correctional staff, and that it is exempt from disclosure under the personal privacy exemption in section 21(1).

[308] In my view, there is a compelling public interest in disclosing this information, because it would inform or enlighten the public about the conduct of correctional staff and shed light on the incident that led to the inmate's death. The purpose of the section 21(1) exemption is to protect the privacy of individuals with respect to personal

[87] Orders P-984 and PO-2607.
[88] Orders P-984 and PO-2556.
[89] Order P-984.

information about themselves held by institutions. I find that the compelling public interest in disclosing this personal information in the records clearly outweighs the purpose of the section 21(1) exemption in this particular case. As a result, the public interest override in section 23 of the *Act* applies to this information, and it must be disclosed to the appellant.

ORDER:

1. Subject to order provision 2, I order the ministry to disclose the following records to the appellant: pp. 59-60, 65, 96-97, 118-120, 121, 122, 123-125, 126-127, 129-130, 131, 132-133, 134, 135-136, 137, 138-139, 140, 141-142, 146-148, 149-151, 153-155, 173-175, 179-180, 184-185, 190-192, 193-195, 196-197, 198-202, 203-205, 206-210, 211-213, 214-216, 217-219, 220-222, 223-225, 226-228, 229-231, 232-233, 234-236, 237-239, 240-242, 243-246, 247-248, 249-251, 252-253, 254-255, 256-257, 258-259, 260-261, 262-264, 265-266, 267-268, 269-271, 272-274, 275-276, 277-280, 312-319 and 334- 338.

2. I order the ministry to sever the following information from the records ordered disclosed under order provision 1 because it is exempt from disclosure under section 14(1)(k) or 21(1):

    a. the names of inmates other than the deceased inmate on pp. 180, 194, 208 and 212 and the names and OTIS numbers of these other inmates on pp. 316-317;

    b. the name of a correctional officer who was suspended from his position, on pp. 96 and 97;

    c. a correctional staff person's description of a health ailment that she has on p. 219;

    d. the work telephone numbers of correctional staff on pp. 65, 123, 125, 129, 132, 135, 138, 141 and 208;

    e. the specific work hours of correctional staff on pp. 131, 197, 204, 215, 221, 228, 245, 248 and 279; and

    f. the information that describes a specific procedure that correctional staff follow when responding to an emergency code on pp. 148, 150, 154, 192 and 248.

3. I am providing the ministry with a copy of the records ordered disclosed under order provision 1 and have highlighted in yellow the information that must be severed under order provision 2. To be clear, the ministry must only withhold the information highlighted in yellow. It must not withhold the information

highlighted in grey, which shows the ministry’s previous severances, unless such information is also highlighted in yellow.

4. I allow the ministry to sever the information specified in order provision 2 if it appears on any other pages of the records and I have inadvertently failed to highlight it in yellow.

5. I order the ministry to disclose the video of the segregation unit hallway to the appellant but to obscure the cells on either side of the hallway, which are exempt from disclosure under section 14(1)(k).

6. I order the ministry to disclose the above records to the appellant by **September 22, 2023** but not before **September 18, 2023**.

7. I reserve the right to require the ministry to provide me with a copy of the records that it discloses to the appellant.

8. I uphold the ministry’s decision to deny access to the remaining records and parts of records because they are either excluded from the *Act* by section 65(6) or exempt from disclosure under section 14(1)(k) or 21(1).

Original Signed by: August 18, 2023

Colin Bhattacharjee
Adjudicator

APPENDIX A: RECORDS AT ISSUE

Record number	General description of record	Ministry's access decision	Exclusion/ exemption(s) claimed	IPC adjudicator's decision
18	OTIS content profile	Withheld in part	s. 21(1) ss. 14(1)(i), (j), (k) and (l)	Severed parts exempt from disclosure under s. 21(1) No disclosure ordered
58	Memorandum to staff	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
59-60	Occurrence report	Withheld in part	s. 21(1)	Severed part not exempt from disclosure under s. 21(1) Ministry ordered to disclose record to appellant with no severances
65	AED event form	Withheld in part	s. 21(1) ss. 14(1)(i), (j), (k), and (l)	One severed part exempt from disclosure under s. 14(1)(k) Other part not exempt from disclosure Ministry ordered to disclose record to appellant, with

				severance
91-93	Employee/other information report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
96-97	Employee/other information report, with attachments	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of records are exempt from disclosure under section 21(1) Ministry ordered to disclose record to appellant, with severances
98-100	Message from occupational health and safety committee chair	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
101-102	Occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
103-107	Employee/other information report, with attachments	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
108-111	Occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure

				ordered
112-113	Occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
114	Occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
115	Occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
116	Occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
117	Occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
118-120	Inmate incident report	Withheld in part	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Severed part not exempt from disclosure Ministry ordered to disclose record to appellant with no severances

121	Use of force occurrence report	Withheld in part	ss. 14(1)(i), (j), (k), and (l)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
122	Occurrence report	Withheld in part	ss. 14(1)(i), (j), (k), and (l)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
123	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record are exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant with severances
124	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no severances

125	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record are exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant with severances
126-127	Use of force occurrence report	Withheld in part	ss. 14(1)(i), (j), (k), and (l)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
129	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record are exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant with severances
130	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to

				appellant with no severances
131	Occurrence report	Withheld in part	ss. 14(1)(i), (j), (k), and (l)	One severed part exempt from disclosure under s. 14(1)(k) Other part not exempt from disclosure Ministry ordered to disclose record to appellant, with severances
132	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record are exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant with severances
133	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no severances

134	Occurrence report	Withheld in part	ss. 14(1)(i), (j), (k), and (l)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
135	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record are exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant with severances
136	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no severances
137	Occurrence report	Withheld in part	ss. 14(1)(i), (j), and (l)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
138	Email	Withheld in full	s. 65(6) s. 21(1)	Record not excluded

			ss. 14(1)(b), (e), (i) and (k)	from *Act* by s. 65(6) Parts of record are exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant with severances
139	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no severances
140	Occurrence report	Withheld in part	ss. 14(1)(i), (j), (k), and (l)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
141	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record are exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant with severances

142	Email	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no severances
146-148	Use of force occurrence report	Withheld in part	ss. 14(1)(i), (j), (k), and (l)	One severed part exempt from disclosure under s. 14(1)(k) Other severed parts not exempt from disclosure Ministry ordered to disclose record to appellant, with severances
149-151	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record are exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant, with severances
153-155	Statement	Withheld in part	Not responsive s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Non-responsive part not at issue

				Some parts of record are exempt from disclosure under s. 14(1)(k) Other parts not exempt from disclosure Ministry ordered to disclose record to appellant, with severances
168	Occurrence report	Withheld in part	ss. 14(1)(i), (j), (k), and (l)	Severed part exempt from disclosure under s. 14(1)(k) No disclosure ordered
173-175	Use of force occurrence report	Withheld in part	ss. 14(1)(i), (j), (k), and (l)	Severed part not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
179-180	Correctional officer notes	Withheld in part	s. 21(1)	Some severed parts exempt from disclosure under s. 21(1) Other parts not exempt from disclosure Ministry ordered to disclose record to appellant, with severances

181-183	Employee/other information report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
184-185	Inmate incident report	Withheld in part	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Severed part not excluded or exempt from disclosure Ministry ordered to disclose record to appellant with no severances
187	Email	Withheld in part	ss. 14(1)(i), (j), (k) and (l)	Severed part exempt from disclosure under s. 14(1)(k) No disclosure ordered
190-192	Use of force occurrence report	Withheld in part	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Severed parts exempt from disclosure under section 14(1)(k) and 21(1) Public interest override in section 23 applies to information found exempt under s. 21(1) Ministry ordered to disclose record to appellant, with severance

193-195	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record are exempt from disclosure under s. 21(1) Ministry ordered to disclose record to appellant, with severances
196-197	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Part of record is exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant with severance
198-202	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no severances
203-205	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Part of record is exempt from disclosure under s. 14(1)(k)

				Ministry ordered to disclose record to appellant, with severance
206-210	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record are exempt from disclosure under s. 21(1) and 14(1)(k) Ministry ordered to disclose record to appellant, with severances
211-213	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record are exempt from disclosure s. 21(1) Ministry ordered to disclose record to appellant, with severances
214-216	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Part of record is exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant, with severance

217-219	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Part of record is exempt from disclosure under s. 21(1) Ministry ordered to disclose record to appellant, with severance
220-222	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Part of record is exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant, with severance
223-225	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no severances
226-228	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Part of record is exempt from disclosure under s. 14(1)(k)

				Ministry ordered to disclose record to appellant, with severance
229-231	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no severances
232-233	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no severances
234-236	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no severances
237-239	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no

				severances
240-242	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) or exempt from disclosure Ministry ordered to disclose record to appellant with no severances
243-246	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Part of record is exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant, with severance
247-248	Use of force occurrence report	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record are exempt from disclosure under s. 14(1)(k) Ministry ordered to disclose record to appellant, with severances
249-251	Use of force occurrence	Withheld in part	s. 65(6) s. 21(1) ss. 14(1)(b),	Record not excluded from *Act* by s. 65(6) or exempt from

	report		(e), (i) and (k)	disclosure Ministry ordered to disclose record to appellant with no severances
252-253	Use of force occurrence report	Withheld in part	s. 14(1)(i)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
254-255	Use of force occurrence report	Withheld in part	s. 14(1)(i)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
256-257	Use of force occurrence report	Withheld in part	s. 14(1)(i)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
258-259	Use of force occurrence report	Withheld in part	s. 14(1)(i)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances

260-261	Use of force occurrence report	Withheld in part	s. 14(1)(i)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
262-264	Use of force occurrence report	Withheld in part	s. 14(1)(i)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
265-266	Use of force occurrence report	Withheld in part	s. 14(1)(i)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
267-268	Use of force occurrence report	Withheld in part	s. 14(1)(i)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances
269-271	Use of force occurrence report	Withheld in part	s. 14(1)(i)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no

				severances
272-274	Use of force occurrence report	Withheld in part	s. 14(1)(i)	One severed part exempt from disclosure under s. 14(1)(k) Other severed parts not exempt from disclosure Ministry ordered to disclose record to appellant, with severances
275-276	Use of force occurrence report	Withheld in part	s. 14(1)(i)	Severed parts not exempt from disclosure Ministry ordered to disclose record to appellant with no severances

277-280	Use of force occurrence report	Withheld in part	s. 14(1)(i)	One severed part exempt from disclosure under s. 14(1)(k) Other severed parts not exempt from disclosure Ministry ordered to disclose record to appellant, with severance
286-288	OTIS content profile	Withheld in part	s. 21(1)	Severed parts exempt from disclosure under s. 21(1) No disclosure ordered
290	Warrant remanding a prisoner	Withheld in part	s. 21(1)	Severed parts exempt from disclosure under s. 21(1) No disclosure ordered
292	Warrant remanding a prisoner	Withheld in part	s. 21(1)	Severed parts exempt from disclosure under s. 21(1) No disclosure ordered

312-319	Use of force local investigation report	Withheld in part	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Some severed parts of record are exempt from disclosure under section 21(1) Other severed parts of record not exempt from disclosure Ministry ordered to disclose record to appellant, with severances
321-323	Employee/other information report Inmate incident report	Withheld in part	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
324-325	Letter from minister to individual	Withheld in full	s. 21(1)	Record exempt from disclosure under s. 21(1) No disclosure ordered
334-338	Administrative summary	Withheld in part	s. 14(1)(i)	Severed part not exempt from disclosure Ministry ordered to disclose record to appellant with no severances

340-342	Employee/other information report Inmate incident report	Withheld in part	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record excluded from *Act* by s. 65(6) No disclosure ordered
343-348	Letter from individual to minister	Withheld in full	s. 21(1)	Record exempt from disclosure under s. 21(1) No disclosure ordered
N/A	Video of security office	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded by s. 65(6) Parts of record exempt from disclosure under s. 14(1)(k) Other parts not exempt from disclosure Record cannot reasonably be severed under s. 10(2) to disclose non-exempt information No disclosure ordered

N/A	Video of hallway of segregation cells	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record exempt from disclosure under s. 14(1)(k) Other parts not exempt from disclosure Record can be reasonably severed under s. 10(2) to disclose non-exempt information Ministry ordered to disclose record to appellant, with severances
1 to 5	Excerpts from video of hallway of segregation cells	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Excerpts are duplicates of previous video No disclosure required
A to G	Videos of inmate being pushed in wheelchair in various parts of correctional institution	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record exempt from disclosure under s. 14(1)(k) Other parts not exempt from disclosure Record cannot reasonably be severed under s.

				10(2) to disclose non-exempt information No disclosure ordered
E to I	Videos of inmate being pushed in wheelchair in various parts of correctional institution	Withheld in full	s. 65(6) s. 21(1) ss. 14(1)(b), (e), (i) and (k)	Record not excluded from *Act* by s. 65(6) Parts of record exempt from disclosure under s. 14(1)(k) Other parts not exempt from disclosure Record cannot reasonably be severed under s. 10(2) to disclose non-exempt information No disclosure ordered